

05-22-86	Duval Corporation	CENT 80-312-M	Pg
05-27-86	Disciplinary Proceeding	D 86-2	Pg
05-27-86	Pontiki Coal Corporation	KENT 83-181-R	Pg
05-27-86	UMWA for James Rowe, et al. v. Peabody Coal Company	KENT 82-103-D	Pg
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ADMINISTRATIVE LAW JUDGE DECISIONS

05-01-86	Little Sandy Coal Sales	KENT 85-106	Pg
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05-02-86	Gary Hensley v. Harlan Wallins Coal Co.	KENT 86-3-D	Pg
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05-05-86	Ronald Faust v. Asamera Minerals, Inc.	WEST 85-116-DM	Pg
05-06-86	Gary Goff v. Youghiogheny & Ohio Coal	LAKE 84-86-D	Pg
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05-07-86	Pyro Mining Company	KENT 85-105	Pg
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05-08-86	Odell Maggard v. Chaney Creek Coal Corp.	KENT 86-1-D	Pg
05-08-86	R B J Coal Company, Inc.	VA 85-22	Pg
05-12-86	Pine Bluff Sand & Gravel Co.	CENT 85-149-M	Pg
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05-30-86	Four H Coal Company, Inc.	KENT 85-205	Pg
05-30-86	Stoney Fork Coal Company	KENT 85-214	Pg
05-30-86	Dorothy Mae Coal Company, Inc.	VA 85-14	Pg
05-30-86	Helen Mining Company	PENN 85-273	Pg
05-30-86	Delta Sand & Gravel Company	WEST 85-139-M	Pg
05-30-86	Franklin Consolidated Mines, Inc.	WEST 85-144-M	Pg
05-30-86	Loukonen Brothers Stone Co.	WEST 85-167-M	Pg

ALJ ORDER

05-29-86	Austin Power, Incorporated	CENT 86-40	Pg
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Secretary of Labor v. Wilmot Mining Company, Docket No. LAKE 85-47.
(Judge Fauver, April 3, 1986)

Secretary of Labor v. Jim Walter Resources, Docket Nos. SE 85-36-R, 85-62,
85-109, 85-123. (Judge Koutras, April 8, 1986)

Secretary of Labor v. Canon Coal Company, Docket No. PENN 85-201. (Judge
Maurer, May 1, 1986)

Review was denied in the following cases during the month of May:

Secretary of Labor for James Clarke v. T.P. Mining Co., Docket No. LAKE 83
(Reconsideration of Commission Decision)

UMWA on behalf of Rowe, et al. v. Peabody Coal Company, Docket No.
KENT 82-103-D, etc. (Reconsideration of Commission Decision)

COMMISSION DECISIONS

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 83-17-M
 :
MAGMA COPPER COMPANY :

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("the Mine Act"). The issue is whether Magma Copper Company ("Magma") violated 30 C.F.R. § 57.19-128(a) (1982), a mandatory safety standard for metal and non-metal underground mines. The standard, which has since been revised, provides:

Mandatory. Ropes shall not be used for hoisting when they have:

- (a) More than six broken wires in any lay;
- (b) Crown wires worn to less than 65 percent of the original diameter;
- (c) A marked amount of corrosion or distortion; and
- (d) A combination of similar factors individually less severe than those above but which in aggregate might create an unsafe condition. [1/]

1/ The standard was revised and redesignated in 1983 as 30 C.F.R. § 57.19a-24, 48 Fed. Reg. 53228, 53231-32 (November 25, 1983), and was recodified in 1985 as 30 C.F.R. § 57.19024. 50 Fed. Reg. 4082, 4119 (January 29, 1985).

vague to be enforced.) 6 MSHA 1922, 1923 (same 1984) (MSA). We granted Magma's petition for discretionary review and granted the American Mining Congress' request to participate as an amicus curiae. For the reasons that follow, we reverse.

On June 10, 1982, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection at Magma's Superior Mine, a copper mine and mill located near Superior, Arizona. The hoist in the mine's No. 9 shaft was used to lower and raise miners into and out of the mine. During an inspection of the hoist the inspector observed broken and distorted wires in different lays of the wire rope attached to the counterweight of the hoist mechanism. 2/ Based on his visual inspection of the rope the inspector believed that there were 64 broken wires within a distance of 100 feet and that there were as many as four broken wires in one lay length. 3/ Based on his observations, the inspector determined that the wire rope was in an unsafe condition and issued the citation alleging a violation of section 57.19-128(d). Magma abated the alleged violation by installing a new wire rope.

On June 15, 1982, at Magma's behest, Robert Donner, a wire rope engineer for Bethlehem Wire Rope Company ("Bethlehem"), examined the "worst section containing the worst rope lay." Donner testified that at that time he found three breaks in the lay. At the hearing Donner again examined the rope and testified that this time he observed six broken wires. Approximately one month after the citation was issued, Magma had a 12-foot piece of the rope which it considered to be the "worst section," cut off and sent to Bethlehem. An examination of the section revealed no signs of corrosion or rust and showed that the rope maintained a breaking strength of 350,000 pounds. (The catalogue strength of the rope was 358,000 pounds.)

In February 1983, eight months after the issuance of the citation, Roy L. Jameson, an MSHA health and safety specialist, examined the wire rope. After conducting an initial examination of the rope at the mine, Jameson instituted a more extensive analysis at an MSHA laboratory in Denver. The laboratory procedures involved ultrasonic cleaning of the rope and a viewing of the rope with magnification and special lighting. Based on that laboratory analysis, Jameson concluded that the rope was unsafe. Jameson stated that he found 12 broken wires in one lay

2/ The wire rope was composed of six wire strands. Each wire strand was composed of 25 individual wires. The six wire strands surrounded a fiber core.

3/ A lay length is defined as "the distance parallel to the axis of the rope in which a strand makes one complete turn about the axis of the rope." Bureau of Mines, U.S. Department of the Interior, A Dictionary

the argument of Magma's counsel that subsection (d) was too vague to be enforced and counsel's concession that subsections (a), (b) and (c) set forth objective enforceable requirements. The judge agreed that subsection (d) was impermissibly vague, and stated that had he not found a violation of subsection (a) of section 57.128 he would have vacated the citation. The judge noted that subsection (a) clearly requires the non-use and replacement of wire ropes with more than six broken wires in one lay. The judge found Jameson's testimony that he observed 12 broken wires in one lay of wire rope to be more persuasive than that of Donner, who at the hearing testified that he could see only six broken wires. The judge therefore concluded that "a violation of subsection (a) ... was established as the most credible evidence shows there were more than six broken wires in one lay of the cited wire rope on the counterweight." 6 FMSHRC at 1526.

After reviewing the record as a whole, we find that the judge's finding of a violation of subsection (a) is not supported by substantial evidence.

The judge's finding of a violation rests on the testimony of Jameson. While Jameson's testimony that during his post-inspection laboratory analysis he found 12 broken wires in one lay length was unchallenged, the judge apparently failed to take into account other undisputed, relevant evidence. The record as a whole clearly militates against a conclusion that the Secretary proved that on June 10, 1982, there were more than six broken wires in any one lay of the wire rope.

First, we note that the inspector testified without contradiction that on June 10, 1982, he observed a maximum of only four broken wires in any one lay. The judge did not make reference to this testimony. The judge likewise did not make reference to the testimony of Donner that, when he examined the worst rope lay five days after the citation was issued and the violation was cited, he was able to find only three broken wires.

Second, the judge also did not discuss testimony concerning the possible change in the condition of the wire rope between the date of the citation and the time the rope was examined by Jameson, eight months later. There is no dispute that, following the citation, the wire rope was removed from the hoist and stored on a reel in an uncovered outdoor storage area. During this period, it was exposed to the elements, unwound twice from the reel and dragged along the ground. Thus, during the eight-month interval between the issuance of the citation and Jameson's examination of the rope, it was exposed to abnormal conditions and additional stresses. The judge erred in not evaluating the possible

4/ "Peening" is a process whereby the metal in the wire rope flattens and the flattened metal extrudes beyond the outer edge of the rope. The

Further, the techniques of laboratory analysis employed by Jameson to detect breaks in the wire rope were not those imposed by the MSHA standards governing inspection and maintenance of hoists. See 30 C.F.R. § 57.19-120 et seq. (1982). Those standards contemplated regular visual inspection with further field testing when potential problems were indicated or at scheduled intervals. The record indicates that Magma's wire rope examination procedures met or exceeded applicable MSHA requirements. There is no credible evidence that under the examination procedure imposed by the MSHA standards that the inspector found, or Magma could have found, a violation of section 57.19-128(a) on the date of the citation's issuance. 5/

For all of the above reasons, we conclude that the judge's finding of a violation of 30 C.F.R. § 57.19-128(a) is not supported by substantial evidence. 6/

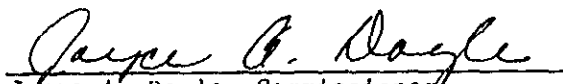
Finally, we address the judge's finding that section 57.19-128(d) is unenforceably vague. The judge stated that section 57.19-128(d) was too vague to convey the standard of conduct required of the mine operator. 6 FMSHRC 1525-26. The judge was in error. We reiterate that the fact that a standard is drafted in general terms does not mean that it is void for vagueness. Many standards must be drafted broadly in order to be adaptable to the myriad of circumstances in a mine. Kerr McGee Corp. 3 FMSHRC 2496, 2497 (November 1981). Such a standard, like section 57.19-128(d), is not unenforceably vague when a reasonably prudent per

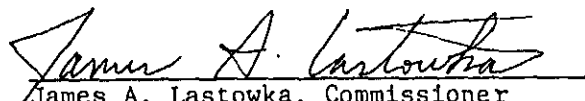
5/ We are aware that the record does indicate that prior to the subject citation being issued, replacement of the cable was under consideration. However, there is no indication that the reason for such replacement was because of non-compliance with the instant regulation.


6/ On review Magma also challenges the judge's post hearing sua sponte amendment of the Secretary's complaint to assert a violation of subsection (a). Magma argues that it was prejudiced by the amendment in that it had not been given the opportunity to fully litigate the issue. In light of our conclusion that the judge's finding of a violation of subsection (a) is not supported by substantial evidence, it is unnecessary to reach this assignment of error. We note in passing, however, the importance of compliance with Rule 15(b) of the Federal Rules of Civil Procedure when considering such amendments and that rule's emphasis upon the parties understanding that the unpleaded claim is, in fact, being litigated.

Accordingly, the decision of the administrative law judge is reversed and the citation is vacated. 7/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

7/ Chairman Ford did not participate in the consideration or disposition of this case.

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CENT 80-312-M

DUVAL CORPORATION

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER


BY THE COMMISSION:


In this matter pending on review, the parties filed with the Commission on May 7, 1986, a joint motion for approval of settlement and dismissal of the petition for discretionary review.


In the decision below, Commission Administrative Law Judge Morris concluded that respondent Duval Corporation ("Duval") had violated 30 C.F.R. § 57.19-120 (1984), and assessed a civil penalty of \$395.00 for the violation. 6 FMSHRC 1359 (May 1984). The Commission subsequently granted Duval's petition for discretionary review. The parties' settlement motion states that Duval sold the mining operation in question in the latter part of 1985 and "no longer wishes to contest the decision of the administrative law judge." According to the motion, Duval is "willing to pay the \$395.00 penalty assessed by the judge."

We have reviewed the settlement motion in light of the record and the statutory penalty criteria (30 U.S.C. § 820(i)), and conclude that the settlement agreed to by the parties is appropriate. Accordingly, we approve the settlement. 30 U.S.C. § 820(k). The joint motion for review of the Commission's direction for review is vacated, and this proceeding is dismissed. 1/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This inquiry is to determine whether disciplinary proceedings arising under Commission Procedural Rule 80, 29 C.F.R. § 2700.80, are warranted. 1/ On January 22, 1986, Commission Administrative Law Judge Joseph B. Kennedy referred to the Commission circumstances involving a operator's counsel that he believed warranted discipline. The circumstances arose during the contest of a civil penalty proceeding, and the judge included the disciplinary referral in his decision on the merits.

1/ Rule 80 states in part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission.

(c) Procedure. [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision....

is with the disciplinary referral.

The substance of the disciplinary referral concerns the conduct of counsel for Y&O in the penalty case. The judge asserts that counsel violated applicable standards of professional conduct by failing to file post-hearing findings of fact, conclusions of law, and supporting argument. The judge also asserts that counsel abused the Commission's legal process by raising frivolous arguments, ignoring applicable precedents, and by persistently badgering the witnesses and the judge. On the grounds explained below, we conclude that disciplinary proceedings are not warranted.

The procedural background of the underlying penalty case serves as a backdrop for the disciplinary referral. In assessing proposed penalties for the two alleged violations at issue in the penalty proceeding, the Department of Labor's Mine Safety and Health Administration ("MSHA") elected to waive its regular penalty assessment formula contained in 30 C.F.R. § 100.3 and conduct special penalty assessments pursuant to 30 C.F.R. § 100.5. As a result of the special assessments, the Secretary of Labor filed with the Commission a proposal for civil penalties of \$850 and \$900. Y&O answered by asserting, among other things, "The citations do not meet the criteria required in 30 C.F.R. [§] 100.5 to allow for a special assessment." Y&O requested that the citations be "properly assessed" under section 100.3. Y&O maintained this position throughout the proceeding.

At the close of the hearing, the judge delivered a tentative bench decision in which he found that the two violations had occurred and that penalties in the amounts of \$1,000 and \$950 were warranted. The judge advised the parties that after the transcript of the hearing was received, he would issue an order requiring the parties to show cause why the bench decision should not be adopted as a final decision. Following this procedure, the judge subsequently adopted the bench decision and ordered Y&O to pay the penalties that he had assessed.

Y&O sought review of the judge's decision. On review, the Commission concluded that the judge's decision was procedurally deficient because it violated Commission Procedural Rule 65(a), 29 C.F.R. § 2700.65(a). 2/

2/ Rule 65(a) states in part:

The [Judge's] decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them....If a decision is announced orally from the bench, it shall be reduced to writing....

inadequacy of ... [the] findings [in the bench decision] and make whatever additions ... appear necessary to meet the Commission's rules."

The Commission denied Y&O's petition for interlocutory review of this order. Nevertheless, Y&O did not submit any proposed findings, conclusions, or arguments. The judge then ordered Y&O to show cause it should not be deemed in default. Y&O did not respond. The judge thereafter adopted his prior decision, made supplemental findings of fact and conclusions of law regarding the civil penalty aspects of the case, and referred to the Commission the question of whether the conduct of Y&O's counsel warranted disciplinary action. 8 FMSHRC at 123, 138.

We first examine the charge that counsel failed to respond to the judge's order to provide findings of fact, conclusions of law, and arguments in support thereof. Y&O requested relief from the order, but the Commission denied Y&O's request. Y&O did not file the materials with the judge nor did it respond to the order to show cause.

In defense of counsel's failure to respond to the order to submit materials, Y&O argues that the proposed findings, conclusions, and arguments would have served no useful purpose in that the judge previously had decided the case adversely to Y&O. This argument is not well taken. Commission Procedural Rule 62 provides that a judge "may require the submission" of materials such as those that the judge ordered Y&O to file. Belief that an order is erroneous, unwise, or serves no useful purpose does not excuse compliance by counsel. The proper course of action, unless and until an order is stayed or invalidated on appeal, is for counsel to obey. Chapman v. Pacific Telephone and Telegraph Co. 613 P.2d 193, 197 (9th Cir. 1979). Counsel cannot choose selectively the orders with which he will comply. Once Y&O's request for interlocutory review of the judge's order was denied, counsel was obliged to respond.

This said, we also conclude that counsel's failure to respond in the particular circumstances obtaining here was not so egregious as to warrant the institution of disciplinary proceedings. Y&O and its counsel have asserted that counsel meant no disrespect for, or contumacy toward the judge and have apologized for counsel's conduct. Moreover, counsel frequently has appeared before the Commission and the failure to respond here was apparently a first-time occurrence. Therefore, we deem it sufficient to caution counsel against ignoring orders issued by the Commission or its judges in the future.

3/ Rule 62, 29 C.F.R. § 2700.62, states in part:

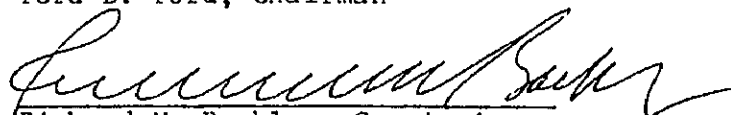
The judge may require the submission of proposed findings of fact and conclusions of law, and orders, together with supporting briefs.


by MSHA." 8 FMSHRC at 125. As the judge correctly states, the Commission has held that once a penalty is contested and Commission jurisdiction attaches, a judge's determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record information developed in the course of the adjudication. Waltersburg Stone Co., 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (6th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (1984). We, however, find that counsel's argument did not stand in opposition to this well-settled principle. Rather, it was premised upon the theory that in certain circumstances a Commission judge has the authority to remand a proposed penalty assessment to MSHA for reassessment under appropriate MSHA penalty regulations. As both the judge and counsel appear to have recognized, this issue has not yet been specifically ruled upon by the Commission. We cannot conclude that counsel's argument constituted frivolous advocacy.

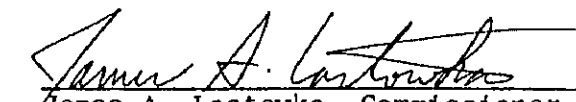
We further conclude that counsel did not "[persist] in badgering the witnesses and the trial judge." Our review of the record reveals that counsel was properly insistent and assertive in his questioning, and was not discourteous or abusive. Similarly, we have considered and rejected the additional asserted bases for referral urged by the judge.

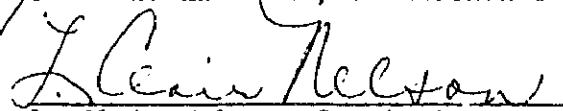
For the foregoing reasons, we conclude that disciplinary proceedings in this matter are not warranted. Accordingly, this inquiry is terminated.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

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SECRETARY OF LABOR,	:	Docket Nos.	KENT 83-181-R
MINE SAFETY AND HEALTH	:		KENT 83-182-R
ADMINISTRATION (MSHA)	:		KENT 83-183-R
	:		KENT 83-184-R
v.	:		KENT 83-256
	:		KENT 83-262
PONTIKI COAL CORPORATION	:		

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this consolidated contest and penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the Commission granted the Secretary of Labor's petition for discretionary review of a decision by Commission Administrative Law Judge Joseph B. Kennedy. 1/ The judge's decision, reported at 6 FMSHRC 781 (March 1984)(ALJ), confirms a prior bench decision in which he granted a joint motion to approve a settlement. The issue presented is whether the judge abused his authority through the manner in which he addressed the settlement agreement and the circumstances surrounding the issuance of the pertinent citation and orders of withdrawal. For the reasons that follow, we conclude that the judge's decision goes beyond the record, includes comments lacking record support, and constitutes a serious abuse of authority. Accordingly, we strike the judge's objectionable comments and affirm his settlement approval on the narrow grounds on which it properly rests.

I.

Factual Background

Pontiki Coal Corporation ("Pontiki"), a subsidiary of Mapco, Inc., operates Mine Number Two, an underground coal mine located in Martin

1/ The Commission is an independent adjudicatory agency established by Congress to resolve legal disputes under the Mine Act. 30 U.S.C. § 823. The Commission is not a part of and is no way connected with the Department of Labor. Rather, the Department of Labor appears before the Commission as a party to litigation under the Mine Act.

Pontiki's mine foreman could not produce any record books concerning recent preshift/onshift conveyor belt examinations. From the bottom of the slope outby for a distance of approximately 100 feet, the inspector observed the presence of loose coal, coal dust, and float coal dust in the slope conveyor belt entry. The inspector noted that, among other things, the material had accumulated on top of the conveyor belt pan to a depth of up to 12 inches, surrounding the upper belt in many places. The conveyor belt was operating at the time. The inspector also noted several other violative conditions in the area, including a damaged walkway and handrail and a conveyor belt discharge roller not provided with a guard.

The inspection party did not proceed inby the No. 1 conveyor belt air locks, but instead rode a man-trip down the track entry, past the No. 4 conveyor belt, to an extension of the No. 1 conveyor belt. The inspector's notes reflect several ventilation readings and calculations for air flow in that vicinity. His notes show the presence of an impermissible sump pump in a return air course and the lack of a check-in/check-out system for supervisory personnel at the mine. The inspector's notes also show that Pontiki cleaned up the accumulation on the slope conveyor belt.

As a result of his observations, the inspector issued several section 104(a) citations to Pontiki for the violative conditions that he encountered, and held a close-out conference with mine officials. He designated the accumulation violation as significant and substantial, but noted that the accumulation appeared to be spillage and that there was "[v]ery little that management can do about intermittent spillage." The inspector specified 8:30 a.m. on March 1, 1983, the next day, as the "Termination Due" date on the citation for failure to record preshift/onshift conveyor belt examinations.

After being issued the record-keeping citation, the two most senior Pontiki supervisors present in the mine that day walked along the conveyor belt lines and filled out an onshift examination report. According to counsel for Pontiki, the report revealed conveyor belt rollers in need of repair and accumulations of coal dust and float coal dust on the No. 1 and No. 4 conveyor belts. Based on their report, which was filed at

2/ The factual background presented in this decision is derived primarily from the transcript of the prehearing/settlement conference held before the administrative law judge on February 7, 1984, and the responses of the parties to the judge's pre-trial orders of September 7, 1983, and January 10, 1984. No evidentiary hearing was conducted. After the Commission directed this matter for review, several unauthorized documents were struck from the official record. 6 FMSHRC 1131 (May 1984). Those documents have not been considered in deciding this case.

several of them to clean accumulations from around the No. 1 and No. 4 conveyor belts, change old rollers, replace bottom rollers, and rock dust the areas following cleanup operations.

At approximately 10:00 a.m. that same day, an MSHA inspection party returned to the mine and proceeded to walk along the idled No. 1 conveyor belt. Once past the conveyor belt air locks, they observed accumulations of loose coal, coal dust, and float coal dust ranging in depths of up to 40 inches. These conditions existed, in varying degrees, along the 2,000-foot course of the No. 1 conveyor belt. In several places, the coal and coal dust had accumulated until it covered the bottom rollers and touched the bottom belt. The material ranged from very dry to only slightly moist. The inspector issued Citation No. 2052746, a section 104(d)(1) citation, alleging a violation of 30 C.F.R. § 75.400, as a result of observing these conditions.

At the same location, the inspector noticed 52 damaged conveyor belt rollers, numerous places where the conveyor belt rubbed against the roller bracket to the extent that from 1/4 - to 1/2 - inch of the bracket had been worn away, and the bottom belt lying on the accumulated material at several locations (in one instance for a distance of 48 feet). The inspector issued Order No. 2052747, a section 104(d)(1) order of withdrawal, alleging a violation of 30 C.F.R. § 75.1725, based on the unsafe condition of this conveyor belt.

A Pontiki safety inspector asked whether the MSHA inspectors could issue a section 107(a) imminent danger order of withdrawal instead of initiating the section 104(d)(1) "chain." An MSHA inspector replied that the conditions encountered were significant and substantial violations resulting from an unwarrantable failure to comply with applicable standards but that there was no immediate source of ignition for the float coal dust. The MSHA inspectors' notes quote the safety inspector as responding, "We'll start the belts if that's what it takes to get a 107(a) order issued." The MSHA inspectors informed him that the conveyor belt was already under a withdrawal order.

The MSHA inspectors issued another section 104(d)(1) order of withdrawal, Order No. 2052748, alleging a violation of 30 C.F.R. § 75.404, for lack of any evidence of preshift/onshift conveyor belt examinations. 3/

3/ In a subsequent modification of this order issued on March 8, 1983, it was noted that some earlier dates and initials were found in the No. 1 conveyor belt entry, but that no evidence could be found to indicate that examinations were conducted between February 3 and February 27, 1983. According to the inspector, 11 to 13 production shifts were worked during that period as evidenced by Pontiki's preshift/ onshift record books for the two working sections involved.

The inspectors' notes of the close-out conference conducted that day reflect that Dennis Jackson, Pontiki's Vice President for Operations stated that the inspectors "were being unfair to the company." The notes quote Jackson as stating that "he felt [the inspectors] had 'double-barrelled' them..." The inspector who wrote this note surmised that Jackson's feelings "were in reference to the citation on records of belt examinations [and] citations and orders written on conditions found in the beltline." Jackson abruptly left the conference, and the inspectors "felt that it was best to leave at this time."

II.

Procedural History

Of the citations and orders issued during the two days of inspection Pontiki contested only the one citation and three orders of withdrawal issued on March 1, 1983. The subsequently consolidated contest and penalty proceeding was assigned to Judge Kennedy. MSHA's Office of Assessments proposed penalties of \$2,294 for the four alleged violations. The parties submitted extensive information in response to the judge's pretrial orders of September 7, 1983, and January 10, 1984.

On February 7, 1984, the parties appeared before the judge for a prehearing/settlement conference. As a basis for settlement, counsel for the Secretary of Labor offered to reduce the penalties proposed to \$1,900 for Pontiki's admission of the violations as written, while Pontiki offered to admit to violations but not to the section 104(d)(1) "special findings." The judge found neither offer acceptable. At the conclusion of the conference, the parties agreed to a settlement agreement proposed by the judge. He issued a bench decision approving the settlement agreement. 4/

The written decision of March 30, 1984, confirms the prior bench decision. Under the terms of the settlement agreement, Pontiki agreed to pay a civil penalty of \$7,500 to be allocated among the four violations as the judge deemed appropriate. Tr. 59; 6 FMSHRC at 786. (The judge suggested that he had "remitted" \$3,000 from a previously suggested penalty of \$10,500 in exchange for a letter from the operator admonishing the responsible individuals. Id.; Tr. 58-60).

4/ In his PDR, the Secretary seems to suggest that the parties may not actually have "moved" for such a settlement. However, the Secretary's trial counsel not only made no objection to the "settlement" terms as described by the judge, he indicated that the judge's recitation of the "settlement" was "agreeable." Tr. 59-60.

conveyor belt examinations on February 28, 1983, "this should have alerted them to conduct a physical examination of these areas." 6 FMSHRC at 782. The judge termed the inspection sequence employed a "dereliction" because, by only inspecting near the slope bottom before proceeding down the track entry on a personnel carrier, the inspectors failed to observe or cite Pontiki for "enormous" accumulations of combustible material. Id.

The judge declared:

The record strongly suggests that the reason the inspectors were "persuaded" to tour around the main beltline and ignore the "message" of the omitted preshift and onshift reports was to permit the operator to run coal for one more shift and management to "voluntarily" idle the mine and begin cleanup operations. Indeed, the record shows that in return for the "advance notice" of the "spot" inspection that did not begin in earnest until March 1, 1983, the operator idled its production at 3:30 p.m. on Monday, February 28 and began cleanup. The record also shows that in return for the operator's "cooperation" the inspectors expected to issue only 104(a) citations but were so appalled by the conditions actually encountered they felt compelled to issue unwarrantable failure citations and closure orders.

6 FMSHRC at 783 (footnote omitted). The judge further asserted that at the time the MSHA inspectors issued the section 104(d)(1) citation on March 1, they were "no longer willing to turn a blind eye to the conditions encountered." 6 FMSHRC at 783 n. 2. He stated that as a result of this action, "the operator's vice president for operations ... felt he had been double crossed or 'double barrelled' as he put it." 6 FMSHRC at 783.

The judge was critical of MSHA, in that the agency had declined to specially assess the violations or refer them for a determination of whether "knowing" or "willful" violations had been committed. 6 FMSHRC at 784-85. He condemned MSHA for its "cheaper by the dozen" policy of lumping multiple discrete violations into one citation and three orders of withdrawal and for the fact that the Solicitor had offered to "reward" Pontiki for challenging the violations by "discount[ing]" his proposed penalties. 6 FMSHRC at 784. The judge likened MSHA's lack of oversight of the Pikeville and Paintsville district offices to the type of "callous indifference and dereliction" at Pikeville that led to the 1976 Scotia Mine disaster in which 26 people had lost their lives. 6 FMSHRC at 784-85.

entitled to know what occurred on that date that later led the operator's vice president for operations to feel he had been "spun" or "double barreled" by MSHA. Was there a hidden quid pro quo for the abbreviated inspection of the beltline on February 28, and, if so, what was it? Was the abbreviated inspection of the beltline designed to alert the operator to the real inspection that commenced the next day? Or was MSHA innocent to the point of naivete? And, if so, what is the public to conclude about MSHA's capacity to serve as a sophisticated enforcement agency? I believe these and other questions deserve an answer.

6 FMSHRC at 785.

The judge recommended "that this matter be referred to the inspector general of the Department of Labor for a full and true disclosure of the facts relating to MSHA's failure to inspect the beltlines in question on February 28, 1983." 6 FMSHRC at 785. He also recommended "that this case be referred to the MSHA's office of special investigations for a determination of liability on the part of the operator or any [of] its employees under sections 110(c) and/or (d) of the Act." Id. The judge stated that he had "probable cause to believe" that Jackson knew of the existence of the violative conditions and of their gravity prior to February 28, 1985. Id. He stated, "[I]ronically, [this] is the same individual whom counsel represented would take disciplinary action against the mine foreman allegedly responsible for the violation" and, if he did so, "it must have been done with tongue-in-cheek." Id.

In closing, the judge ordered the settlement agreement approved, allocated the \$7,500 in civil penalties equally among the four violators and ordered the Commission to take such action as it deemed appropriate to refer the matter to the Assistant Secretary of Labor for Mine Safety and Health in order to initiate the two investigations that he felt were justified on the above facts. 6 FMSHRC at 786.

On May 8, 1984, the Commission granted the Secretary's petition for discretionary review. According to that pleading, the Secretary took the "unusual step" of petitioning the Commission for review of a decision approving a settlement "because of the egregious nature of many statements contained in that opinion and the fact that the integrity of certain individuals has been unfairly maligned." Sec. PDR and Br. at 5. The Commission granted the Secretary's petition and, as a result of "the serious allegations of possible criminal misconduct by federal employees and officials" contained in the judge's submissions, the Commission, sponte, also referred the matter to the Department of Justice for "appropriate action." Letter to the Attorney General from the Commission

the official record." 3 FMSHRC 1151 (May 1984). The Commission also struck, as not being part of the record before the judge, the affidavit and memorandum attached to the Secretary's petition for discretionary review. Id.

The Public Integrity Section of the Department of Justice's Criminal Division responded conclusively to the Commission's investigative referral by letter dated May 2, 1986. The letter states that the "allegations made by Administrative Law Judge Joseph Kennedy about possible bribery or the giving of advance notice of mine inspections by [MSHA] inspectors" were subjected to a "limited inquiry to determine whether sufficient evidence existed to initiate a full investigation...." The letter concludes, "Based upon the results of that inquiry, we decided that further criminal investigation is not warranted, and we have closed the matter as to the allegations of bribery and advance notice."

III.

Disposition

The Secretary argues that the judge abused his authority by addressing in his published decision matters far beyond the scope of the proceeding below, making numerous statements and findings unsupported by any evidence, and venturing comments that are defamatory, derogatory, and inappropriate. Relying on the Commission's decision in Inverness Mining Co., 5 FMSHRC 1384 (August 1983), the Secretary requests that most of the text of the judge's decision be stricken.

Settlement of contested issues is an integral part of dispute resolution under the Mine Act. Section 110(k) of the Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). See also Commission Procedural Rule 30, 29 C.F.R. § 2700.30. In Knox County Stone Co., Inc., 3 FMSHRC 2478 (November 1981), the Commission described some of the "outer boundaries" of the authority its judges possess in settlement adjudication. While noting that a judge's oversight of the settlement process is an adjudicative function that involves wide discretion, the Commission observed that the scope of that discretion is not unlimited. 3 FMSHRC at 2479. The Commission stated:

Rejections [of settlement], as well as approvals, should be based on principled reasons. Therefore, we [have] held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria, and is not otherwise

The Commission previously has warned Judge Kennedy not to indulge in settlement "approval" decisions roaming far beyond the limited record typically involved in the settlement process. Inverness Mining, supra, 5 FMSHRC at 1388-89. As the Commission has stated repeatedly, if a judge disagrees with a stipulated penalty amount or believes that any questionable matters bearing on the violation or appropriate penalty amount need to be clarified through trial, he is free to reject the settlement and direct the matter for hearing. Knox County, supra, 3 FMSHRC at 2481-82; Tazco, Inc., 3 FMSHRC 1895, 1898 (August 1981). The process followed by Judge Kennedy in the present case violated these well-established principles.

At the close of the prehearing/settlement conference -- during which, we emphasize, no evidentiary testimony had been developed -- Judge Kennedy issued a bench decision approving the settlement agreed to by the parties. Tr. 59-60. According to the terms of that oral agreement as related by Judge Kennedy on the record, the only issues disposed of were those contested by the parties -- namely, the violations reflected in the citation and orders of withdrawal, the appropriate civil penalty and the "letter of admonition" required by the judge before he would approve the settlement agreement. At this stage of the proceedings, it should have been clear to Judge Kennedy that his written decision would be limited in scope by the abbreviated dispute resolution mechanism employed by the parties and approved by him. Instead, his subsequent written decision addressed numerous matters beyond the scope of the parties' settlement agreement and the scant -- and untried -- record in this matter.

The pre-trial submissions offered in this proceeding, upon which the judge's decision purports to rest, were made in response to the judge's pre-trial orders. Not only do they lack the evidentiary character of testimony and evidence offered at a hearing and subjected to the crucible of cross-examination and trial, they also do not provide support for any of those portions of the decision sought to be stricken by the Secretary. The limited nature of these submissions reinforced the need for the judge to limit himself to the confines of the issues resolved, or fairly touched on, by the mutual consent of the parties. Inverness Mining, 5 FMSHRC at 1388. Cf. ABC Air Freight Co. v. CAB, 391 F.2d 295 305 (2d Cir. 1968), cert. denied, 397 U.S. 1006 (1970).

We proceed to examine the judge's various objected-to pronouncements seriatim. We find all of them lacking in record support.

A. Improper advance notice

The record reveals that during the inspection conducted on February 1983, an MSHA inspector issued a citation for failure to record preshift onshift conveyor belt examinations. On the same date, the citation

Among other things, the purpose of a specific abatement due date is to put the operator on notice as to when the enforcement authority requires the alleged violation to be corrected. Therefore, it is logical for an operator to assume that a further inspection may be conducted on or shortly after that date to ascertain that the condition, in fact, has been corrected. Moreover, the statements of Pontiki's counsel in response to the judge's questioning on this issue provide no basis for a finding of advance notice. Tr. 54-55. Absent anything more in the record to support his assertion, we conclude that the judge's insinuations of improper advance notice lack support in the present record. Cf. Inverness Mining, 5 FMSHRC at 1388.

B. Bribery

Judge Kennedy queried whether there was "a hidden quid pro quo for the abbreviated inspection of the beltline on February 28." 6 FMSHRC at 785. He also asked what had led Dennis Jackson, Pontiki's Vice President of Operations, to feel that he had been "spun," "double crossed or 'double barrelled' as he put it." 6 FMSHRC at 783, 785. The tone of these "queries," which relate to possible criminal conduct, renders the judge's statements as declarative as they are interrogative in nature. The Secretary argues that the judge incorrectly equated the term "double-barrelled" with the term "double-crossed."

In common parlance, the term "double-barrelled" means receiving a measure of something that is, perhaps, in excess of that required. Nowhere does the term "double-crossed" appear in the record. Rather, the existing record tends to show that when Jackson used the term "double-barrelled," he did so in the context of Pontiki's having received a citation for failure to maintain records of preshift/onshift conveyor belt examinations as well as a subsequent order of withdrawal for lack of evidence that the examinations had actually been made. There is nothing in the record affording a shred of support to the judge's innuendo of bribery.

C. Lax Enforcement

Throughout the body of his decision, the judge directly or indirectly stated that MSHA's inspection at the Pontiki Mine Number Two constituted lax enforcement. 6 FMSHRC at 782-86. The Secretary argues that the judge should have notified the parties of his intention to address this issue in the context of the citation and orders. We agree. The issue of lax enforcement was not within the scope of the settlement agreement and the Secretary was not given an adequate opportunity to establish a record on this issue.

at which time... postulates of corruption or naivete hardly exhaust the universe of possible explanations, and amount to no more than personal, unsupported, and damaging speculation.

D. Accusations of criminal conduct and defamatory comments

The judge's decision contains a number of statements that the Secretary argues are defamatory, derogatory, and inappropriate. While fair and supported criticism of MSHA or any other party appearing before the Commission at times may be appropriate, the judge overstepped his bounds by stating or implying that the inspectors provided advance notice of an inspection, intentionally ignored hazardous conditions, arranged some type of unethical or illegal deal with Pontiki, and received something in return for their willingness to accommodate the operator. As our previous discussion indicates, these statements are not supported by the extant record.

We are particularly disturbed by the judge's allegations of bribery, notice and bribery. These are federal criminal offenses. As the Commission observed in another case involving unfounded criminal accusations by Judge Kennedy:

Any accusation of criminal conduct is a grave matter, not to be undertaken lightly, especially by a jurist schooled in the law and aware of the requirements of due process.

Belcher Mines, Inc., 7 FMSHRC at 1019, 1022 (July 1985) (emphasis in original). In Belcher, the Commission held that by attacking the reputations of individuals and by accusing them of criminal activities

Judge Kennedy assumed the conflicting roles of grand jury, prosecutor, jury, and presiding judge. Jurisdiction over federal criminal matters resides with the United States Department of Justice and the federal criminal justice system. If Judge Kennedy had reason to believe that crimes had been committed, he should have referred the matter to the appropriate authorities at the Department of Justice.

concluded that further criminal investigation was not warranted.

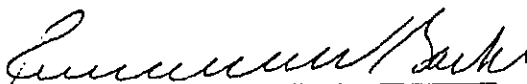
While the judge did not specifically name all of the individuals accused in his decision, the fact remains that in a rural, coal-mining region, the identity of the individuals concerned could readily be determined. In this regard, the Secretary has asked the Commission to take official notice of two front-page newspaper articles that appeared in the local press as a direct result of Judge Kennedy's written decision. We do so, and further note that the reports contain inaccurate statements misconstruing the statutory roles of the Commission and its administrative law judges and the limited scope of the record developed before Judge Kennedy in this proceeding. These press reports highlight the inexcusable damage that can be done to personal and professional reputations when criminal accusations are disseminated in public decisions. What makes such abuse especially egregious in this instance is the fact that Judge Kennedy's charges and criticism lack support in the record before him.


IV.

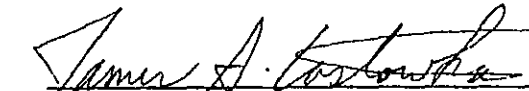
Conclusion

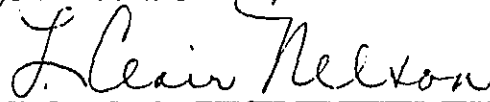
The foregoing is not to say that Commission judges do not possess considerable latitude to comment officially on relevant matters in the public record when the evidence before them and the circumstances warrant appropriate comment. The record in this case discloses that the cited violations were serious indeed. Pontiki's Mine Number Two is classified as a gassy mine, and the cited violative conditions were cause for grave concern. The Secretary initially proposed penalties totalling \$2,294, which he was prepared to compromise to \$1,900. In our view, either figure is inadequate under the circumstances, and the judge rightfully rejected them under section 110(k). We find that the \$7,500 penalty settlement approved by the judge is supported by the record and is consistent with the statutory penalty criteria. Had the judge contented himself with assessing an appropriate penalty and had he limited his comments in doing so to the record developed before him, his duties under the Mine Act would have been discharged properly.

paragraph.
ORDERED that the settlement approved at the prehearing/settlement conference of February 7, 1984, be, and hereby is CONFIRMED, and that the settlement amount agreed upon and paid, \$7,500, be allocated equally among the five violations found." 5/


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

5/ Chairman Ford did not participate in the consideration or disposition of this matter.

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UNITED MINE WORKERS OF AMERICA	:	
(UNWA)	:	
on behalf of JAMES ROWE, <u>et al.</u> ,	:	Docket Nos. KENT 82-103-D
JERRY D. MOORE, LARRY D. KESSINGER	:	KENT 82-105-D
	:	KENT 82-106-D
v.	:	
PEABODY COAL COMPANY	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of THOMAS L. WILLIAMS	:	Docket No. LAKE 83-69-D
v.	:	
PEABODY COAL COMPANY	:	

BEFORE: Backley, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

The Commission concluded previously that Commission Administrator Law Judge Joseph B. Kennedy, while presiding in the above-captioned matter, acted improperly by: (1) engaging in a prohibited ex parte communication; (2) verbally abusing attorneys appearing before him; and (3) commenting publicly on a pending proceeding. United Mine Workers on behalf of Rowe v. Peabody Coal Co., 7 FMSHRC 1136 (August 1985). Commission's decision was the result of an inquiry into allegations contained in a letter to the Commission from Francis X. Lilly, then Solicitor of the Department of Labor. 1/ Judge Kennedy has moved for reconsideration of the decision. For the reasons that follow, the motion is denied.

1/ The Commission is an independent adjudicatory agency established by Congress to resolve legal disputes under the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 823 (1982). The Commission is not a part of and is in no way connected with the Department of Labor. Rather, the Department of Labor appears before the Commission as a party to litigation under the Mine Act.

in prohibition on public telephone conversation with a Department of Labor attorney, Linda Leasure, in which they discussed the merits of the above-captioned discrimination proceeding. The Solicitor also asserted that the judge exhibited abusive conduct toward the Secretary's trial counsel, Frederick W. Moncrief, and toward counsel for the United Mine Workers of America and Peabody Coal Company at an oral argument on the merits of the captioned proceeding. Finally, the Solicitor asserted that Judge Kennedy had threatened Moncrief during a confrontation between the two, occurring at the judge's office subsequent to the oral argument. The Solicitor's letter was accompanied by affidavits from Leasure and Moncrief and by portions of the transcript of the oral argument.

The Commission deemed the Solicitor's letter and the accompanying materials to be, in part, a notification of a prohibited ex parte communication and a request for appropriate action under Commission Procedural Rule 82. 29 C.F.R. § 2700.82. 2/ The Commission served the judge and the parties with copies of the letter and attachments. The Commission also severed the allegations of judicial misconduct from the merits of the discrimination proceedings, reassigned the merits to the Chief Administrative Law Judge, and retained jurisdiction over the misconduct allegations.

2/ Rule 82 states:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

(c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission....

judge's conversation with the author of the article and to state whether he has been quoted accurately.

In response to the Commission's order, the judge moved that the inquiry be dismissed and that the order directing the filing of his sworn statement be stayed. The judge asserted that the inquiry was disciplinary in nature and that the Commission had no jurisdiction to discipline a judge. The Commission denied the judge's motion stating

Before this Commission undertakes to discipline, or seek discipline of, an administrative law judge it needs first to determine whether any disciplinary action is required. The Commission has followed, and will continue to follow, appropriate procedures in seeking to examine the allegations of misconduct that have been raised in this matter. If the Commission later determines that grounds exist for forwarding this matter to the Merit Systems Protection Board, it will do so.
[3/]

The judge subsequently filed a sworn statement and the Commission thereafter accepted for filing affidavits from Mr. Moncrief and Cyn A. Attwood, the Department of Labor's Associate Solicitor for Mine Safety and Health. These affidavits responded to points raised in the judge's affidavit. No further affidavits or other submissions were filed and our decision followed.

The judge now asserts that in reaching our decision on the basis of affidavits and without a confrontational hearing the Commission denied him due process. He also asserts that, in any event, the Commission lacks authority to issue a decision disciplining him and that our decision improperly did so. We find these assertions to be without merit.

3/ Under the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), the Merit Systems Protection Board ("MSPB") hears and decides an employing agency's complaint proposing certain designated types of adverse action against an administrative law judge. 5 U.S.C. § 7521 (1982); see also 5 C.F.R. § 1201.133 (1986).

Secretary of Labor on behalf of Ronnie D. Beavers v. Kitt Energy Corp. and United Mine Workers of America, 8 FMSHRC 15 (January 1986). The Commission also has the responsibility to investigate reported possible instances of unethical or unprofessional conduct in connection with Commission proceedings. When reports of such conduct are made to the Commission an appropriate means to commence our task is to solicit sworn statements from those who have knowledge of the alleged prohibited conduct. Such statements can establish facts bearing upon whether the actions occurred and were in violation of the Commission's rules and applicable standards of conduct. See 29 C.F.R. § 2700.80(a), (b), and (c).

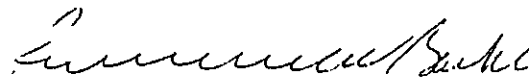
Through this procedure and through the submission of motions and argument, an individual involved in such an inquiry has the right and the opportunity to be heard. There is, however, no requirement that the right to be heard necessarily incorporates an evidentiary hearing. When the record and the sworn statements received are corroborative or un rebutted as to the material issues, and establish a violation of the Commission's rules or applicable standards of conduct, it is proper for the Commission to enter an appropriate finding on the basis of undisputed material facts. As we have stated this same date in Secretary of Labor on behalf of James M. Clarke v. T.P. Mining, Inc., LAKE 83-97-D, slip op. at 4: "Summary decision based on undisputed or un rebutted factual allegations is a procedural course well known to the law. Due process is process that is due under particular circumstances, and does not invariably mandate trial-type proceedings. See, e.g., Hannah v. Larche, 363 U.S. 420, 442-43 (1960)." Conversely, when materially conflicting allegations exist, an evidentiary hearing may be necessary in order to resolve the conflicts. See T.P. Mining, supra, slip op. at 2.

Our actions here are in accord with these principles. The judge was given full opportunity to be heard, as were the other individuals involved. The Commission solicited the judge's sworn statement. The Commission entertained the judge's various motions and supporting arguments. In concluding that the subject communication was ex parte and prohibited; that the judge abused the attorneys appearing before him; and that the judge's comments as reported in the Lexington [Kentucky] Herald-Leader represented improper judicial conduct, the Commission relied on the public record and the non-conflicting portions of the sworn statements of the judge and other parties. 4/ 7 FMSHRC at 1140-44, 1144-46, 1147-48. On the other hand, because the sworn statement

4/ Indeed, the Commission found that the ex parte communication was prohibited even as described by the judge alone. 7 FMSHRC at 1143.

Rule 80 or Rule 82 to provide the judge with an evidentiary hearing. Rule 80 sets forth standards of conduct for "individuals practicing before the Commission" and provides procedures for determining whether discipline is warranted for violations of those standards. A Commission administrative law judge is not an "individual practicing before the Commission" and, hence, Rule 80 is totally inapplicable to the conduct herein involved. Further, Rule 82(b)(1) provides that in the event of prohibited ex parte communication that the Commission "may make such orders or take such action as fairness requires" and that "[u]pon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication." As the judge is aware the Commission has not imposed any discipline on him. ("The Commission did not impose any discipline in its August 5 decision...." Motion for Reconsideration 2 n. 1.) As we have noted, it is the MSPB that by statute and regulation hears and decides designated types of adverse action against an administrative law judge. All that we have done is "to engage in an appropriate process to determine whether discipline is warranted." 7 FMSI at 1139 n. 2.

Therefore, the judge's motion for reconsideration is denied. 5/



Richard V. Backley, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), have been designated a panel of three members to exercise the powers the Commission in this matter.

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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

on behalf of JAMES M. CLARKE

v.

T.P. MINING, INC.

Docket No. LAKE 83-97-D

BEFORE: Backley, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

The Commission concluded previously in this matter that Commission Administrative Law Judge Joseph B. Kennedy and counsel for respondent T.P. Mining, Inc. ("T.P. Mining"), engaged in a prohibited ex parte communication in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82. 7 FMSHRC 1010 (July 1985). 1/ That conclusion resulted from

1/ Rule 82, entitled "Ex parte communications," provides:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) Procedure in case of violation. (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.

(2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

(c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed to the Office of the Executive Director of the Commission....

The thrust of the motion for reconsideration is that the judge was entitled to, and was denied, notice of the specific charges against him and an evidentiary hearing. This assertion evidences a misunderstanding of the nature of this proceeding and the meaning of Rule 82. As shown below, the judge not only had full notice of the concerns at issue in this matter and not only received such process as was due under the circumstances, but in addition he, through his counsel, demanded termination of the inquiry short of an evidentiary hearing.

The factual background and procedural history of this matter are fully described in the Commission's previous decision (7 FMSHRC at 10.11-14), and will not be repeated in detail here. In view of the tone of the present motion for reconsideration, however, it bears re-emphasis that the challenged inquiry was triggered by the judge sending an unsolicited letter to the Commission baldly announcing that "the basis for the settlement [of the underlying discrimination case] was fully disclosed in a discussion between counsel for the operator and the trial judge to which [counsel for the Secretary] was not a party." Because the judge's statement indicated on its face that an ex parte communication had occurred, the participants to the conversation, namely, the judge and the operator's counsel, were ordered to submit affidavits "providing full disclosure of the details and substance" of their conversation.

When an alleged ex parte communication is brought to the Commission's attention, the Commission has a legal and ethical responsibility to pursue the matter. See, e.g., Secretary of Labor on behalf of Ronnie D. Beavers et al. v. Kitt Energy Corp., 8 FMSHRC 15 (January 1986). An appropriate means of commencing that task is for the Commission to examine the record of the relevant proceeding and to solicit statements from those who may have engaged in such a communication or have knowledge of the events at issue, in order to examine facts bearing on the question of whether a violation of Commission rules occurred. If the results of such a preliminary inquiry plainly disclose that no impropriety transpired, the whole matter can then be terminated. See, e.g., Beavers, supra, 8 FMSHRC at 17-21. Conversely, when the record and the statements received are corroborative or un rebutted as to the pertinent issues and establish a violation, a summary conclusion that a violation occurred may be wholly proper under Rule 82 and settled norms of due process. If materially conflicting allegations surface, however, a hearing may be necessary. Against this background, we turn to the judge's allegations that the procedures followed by the Commission in this specific inquiry were improper.

of the settlement, including whether a settlement check had been mailed to the claimant. 7 FMSHRC at 1012-13. After the submission of these statements, the Commission received and accepted from Michael McCord, the Secretary of Labor's appellate counsel, a sworn statement containing further information relevant to the March 28 telephone conversation. In his statement, the Secretary's appellate counsel asserted that he had no reason to believe, because of conversations with the operator's counsel, that the initial statements filed with the Commission did not disclose fully the substance and the details of the March 28 telephone conversation. The Secretary's appellate counsel alleged that the operator's counsel told him that the March 28 conversation included complaints by Judge Kennedy regarding alleged misconduct by the Secretary's trial counsel and an inquiry by Judge Kennedy as to whether the operator's counsel intended to see a particular document from the Secretary. 7 FMSHRC at 1013.

Because the Secretary's appellate counsel's statement suggested a much more extensive telephone conversation than was described initially by Judge Kennedy and the operator's counsel, and because the description of the Secretary's appellate counsel was based on his conversation with the operator's counsel, the Commission ordered the operator's counsel to submit a further affidavit. In his second affidavit, received on September 20, 1984, the operator's counsel stated that during the conversation in question, Judge Kennedy repeatedly had complained to him about the conduct of the Secretary's trial counsel and had asked him whether he intended to request the Secretary's investigative file -- suggesting that such a course of action might be helpful. 7 FMSHRC at 1014. Judge Kennedy filed no response to the affidavits of the Secretary's appellate counsel or to the second affidavit of the operator's counsel. 2/

On October 10, 1984, after both of the now-challenged statements had been received by the Commission, counsel for the judge requested that the Commission close the record in this inquiry. Counsel stated

2/ The operator's counsel apparently did not serve his second statement upon the judge. This defect was cured when the judge obtained a copy shortly after the statement was received by the Commission.

Commission to bring the inquiry to an end. 1/
I therefore request that the Commission
formally close the record in this ... inquiry.

In my August 24 letter to you, I indicated that I intended to depose [the Secretary's appellate counsel] and [the operator's counsel]. I have now concluded that these depositions are not necessary.


Acting upon this request and because there existed no material factual disputes, the Commission closed the record and proceeded to consider all details and substance of the March 28 telephone conversation. On July 10, 1985, we issued our decision stating our findings and conclusions. Only after entry of findings adverse to him did the judge belatedly assert that he was not afforded sufficient opportunity to deny or rebut the opposing accounts of the conversation. This argument is without merit.

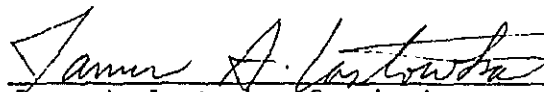
The assertion by the judge that he was not afforded sufficient opportunity to respond is belied by his counsel's statement, which establishes that the judge had full knowledge of the contents of the affidavits, believed that the documents in the record were sufficient and requested that the inquiry be closed. Furthermore, nothing had prevented the judge from responding to the affidavits prior to making his request that the record be closed. The judge's contention that he lacked notice of the allegations of the ex parte communication in this matter strains credulity and is rejected. The judge's additional claim that he was denied an evidentiary hearing fails for the same reasons. It was he who failed to avail himself of the opportunity to rebut the assertions of the operator's counsel and the Secretary's appellate counsel, and it was he who sought to close this inquiry short of a trial.

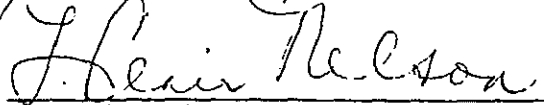
The Commission issued its decision on the basis of the record, the judge's own statement and the unchallenged and consistent statements of other involved individuals. Summary decision based on undisputed or un rebutted factual allegations is a procedural course well known to the law. Due process is the process that is due under particular circumstances, and does not invariably mandate trial-type proceedings. See, e.g., Hannah v. Larche 363 U.S. 420, 442-43 (1960). Moreover, Commission Rule 82 does not require a trial in all cases, but rather states that if a violation occurs, the "Commission ... may make such orders or take such action as fairness requires." 29 C.F.R. § 2700.82(b). A hearing is required only if the Commission contemplates the taking of disciplinary action. Id. The Commission has not disciplined the judge. As th

within the substantial discretion given an administrative agency in adopting, interpreting, and applying procedural rules. See, e.g., American Farm Lines v. Black Ball Freight Service, 397 U.S. 537, 539 (1980); Glimax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 45 (10th Cir. 1983). Because the judge failed to offer a rebuttal at a time appropriate and available under our procedure, and because the matter was closed at his counsel's clear and specific request, the judge's submission of a belated "declaration" denying the account of ex parte conversation sworn to by the other participants was untimely and is rejected.

Accordingly, the administrative law judge's motion for reconsideration of the Commission's decision of July 10, 1985 is denied. 4/


Richard V. Backley, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

3/ The judge's extended reliance on the procedure set forth in Commission Rule 80 is seriously misplaced. Rule 80 expressly sets standards of conduct, and procedures for addressing breaches thereof, for "individuals practicing before the Commission." A Commission administrative law judge is not such an individual.

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), the Commission have been designated a panel of three members to exercise the powers in this matter.

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Administrative Law Judge Joseph B. Kennedy
Federal Mine Safety & Health Review Commission
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Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-106
Petitioner	:	A.C. No. 15-12133-03502
	:	
v.	:	No. 1 Tipple or Tipple Mine
	:	
LITTLE SANDY COAL SALES,	:	
Respondent	:	

DECISION

Appearances: Charles F. Merz, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Edgar B. Everman, President, Little Sandy Coal Sales, Grayson, Kentucky, for Respondent.

Before: Judge Fauver

The Secretary of Labor brought this action for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all times pertinent, Respondent operated, in Kentucky, a coal processing facility, consisting of a scale, scale house, parts and lubricant storage trailer and a portable coal-processing system including coal cleaning, screening, crushing and loading equipment with inner-connecting conveyor belts. The processing system was powered by a 400-volt power unit and diesel engine.

2. On May 18, 1982, Inspector R.C. Hatter inspected Respondent's facility and determined that Respondent was not conducting electrical tests and examinations of electrical equipment as required by 30 C.F.R. § 77.502. He issued Citation 960642 (for not recording electrical inspections), allowing Respondent until May 21, 1982, to comply with the cited standard. Because of Respondent's failure to abate

3. On February 15, 1983, Respondent had Respondent's facility and determined that Respondent had failed to conduct periodic noise surveys as required by 30 C.F.R. § 71.803. He issued Citation 9976274 (for not record noise inspections), which was terminated on March 15, 1983, after timely abatement of the cited condition.

DISCUSSION WITH FURTHER FINDINGS

Respondent's failure to record periodic noise and electrical tests was due to negligence. Respondent contends that the standards should not have applied to its operations because it was a small operation, not subject to significant changes in noise or electrical conditions. This argument is not sound on the facts or the law. Respondent's equipment and processes involved many variables that could change noise or electrical conditions, rendering the required inspections important for safety and health purposes. Also, the law does not permit an operator to reduce or omit the required inspections based on its opinion of the need for such inspections. If an operator believes that the particular facts of its business justify a modification of the application of self-inspection requirements, section 101(c) of the Act provides a procedure for petition to the Secretary to grant a modification in appropriate cases. Respondent did not attempt to use this procedure, but simply ignored the inspection requirements of the Federal Regulations.

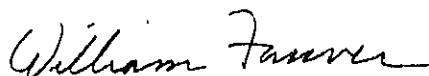
Respondent is a small business. The violations are serious in that the required inspections are an important preventive safety protection of the miners. Considering all of the criteria of section 110(i) for assessing civil penalties, a penalty of \$50 is found appropriate for the violation of 30 C.F.R. § 71.803. Considering all the factors of section 110(i), and the greater seriousness of the electrical reporting violation, and the bad faith delay of achieving compliance with that standard, a civil penalty of \$150 is found appropriate for the violation of 30 C.F.R. § 77.502.

2. Respondent violated 30 C.F.R. § 71.803 as alleged in Citation 9976274, and is ASSESSED a civil penalty of \$50 for such violation.

3. Respondent violated 30 C.F.R. § 77.502 as alleged in Citation 960642, and is ASSESSED a civil penalty of \$150 for such violation.

ORDER

Respondent shall pay the above civil penalties in the total amount of \$200 within 30 days of this Decision.


William Fauver
Administrative Law Judge

Distribution:

Charles F. Merz, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Edgar B. Everman, President, Little Sandy Coal Sales, P.O. Box 335, Grayson, KY 41143 (Certified Mail)

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CANON COAL COMPANY,
Respondent

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor
U.S. Department of Labor, Philadelphia, Penn-
sylvania, for Petitioner;
Joseph Mack, III, Esq., Thorp, Reed & Arm-
strong, Pittsburgh, Pennsylvania, for
Respondent.

Before: Judge Maurer

Statement of the Case

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801, et seq., the "Act," in which the Secretary has charged the Canon Coal Company with five violations of the mandatory safety standards. Prior to the commencement of taking testimony in this case, however, the parties settled \$ 104(a) citation number 24030 alleging a violation of 30 C.F.R. § 75.202 and proposing a \$58.00 civil penalty and a second \$ 104(a) citation, number 2403082, which alleged a violation of 30 C.F.R. § 75.200 and assessed a \$98.00 civil penalty. There was no reduction in the assessed penalties proposed, and I granted the motion to approve settlement on the record (Tr. 9).

The remaining three alleged violations were tried before me at a scheduled hearing on January 9, 1986, at Pittsburgh, Pennsylvania. Documentary evidence and oral testimony were received on behalf of both parties, and both parties have filed post-hearing briefs, including proposed findings of fact and conclusions of law.

The general issues before me are whether the company has violated the regulatory standards as alleged in the petition and, if so, the appropriate civil penalty to be assessed for the violation(s).

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

The Cited Conditions and/or Practices

On October 9, 1984, a fatal roof fall accident occurred at Canon Coal Company's Pitt Gas Mine. As a result of the subsequent Federal Mine Safety and Health Administration investigation, the following citations, still at issue, were issued to the company.

Section 104(a) Citation No. 2403072 cites a violation of 30 C.F.R. § 75.200 for the following alleged practice:

Based on evidence disclosed during the investigation of a fatal roof fall accident, the torque was not tested on any of the roof bolts installed in the area just outby the accident scene as required by Item No. 12 on page 7 of the safety precautions of the approved roof control plan.

and thereafter at least one roof bolt out of every four shall be tested by a qualified person. If any of the bolts tested do not fall within the required torque range, the remaining previously installed bolts on this cycle shall be tested. If the majority of the bolts still fall outside the required torque range, necessary adjustments shall be made and the required torque range obtained. If the required torque ranges are not obtained, supplementary support such as different length bolts with adequate anchorage, posts, cribs, and/or crossbars shall be installed.

The second citation still at issue in this case, Citation No. 2403074, likewise cites a violation of 30 § 75.200 and states:

During the course of a fatal roof fall accident it was revealed that in the haulage entry outby the accident scene, temporary roof supports were not properly installed as required by safety precaution No. 19 in that 2 rows of jacks (2 in each row) were installed in the unsupported area that varied from 16 to 18 feet in width. The approved roof control plan requires temporary supports to be installed across the opening on not more than 5 foot centers. This violation did not contribute to the roof fall accident.

Paragraph No. 19(a)(2) on page 8 of the approved roof control plan states:

19(a). Where roof falls have occurred and at all overcast, boom hole, and other construction sites that require removal of mine roof material, (e.g., by blasting, by ripping with a continuous-mining machine, by cutting with a cutting machine, or other means), the roof shall be considered unsupported. If miners are required to enter such areas, either to travel over the fallen material, to clean it up, or to perform other duties, the roof shall be supported adequately. Mine management shall devise and have posted in writing at

Finally, § 104(d)(1) Order No. 2403083, also citing 30 C.F.R. § 75.200 states:

During the course of a fatal roof fall accident investigation, it was revealed that a miner was working under inadequately supported roof along the main track haulage 450 feet outby the No. 3 belt drive on 10-09-84. Roof, about 45 inches thick, 6 feet long and 13 feet wide fell, striking the miner.

Stipulations

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 12-13):

1. The Pitt Gas Mine is owned and operated by the Respondent, Canon Coal Company.

2. Canon Coal Company's Pitt Gas Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over these proceedings.

4. The subject citations were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent; at the dates, times, and places stated therein, and may be admitted into evidence for the purpose of establishing the issuance, and not for truthfulness, or relevancy of any statements asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect the Respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the small size of the coal operator's business should be based upon the fact that the Pitt Gas Mine's annual production

7. The Respondent demonstrated good faith in attaining compliance after the issuance of the 104(a) citation.

8. The parties stipulate to the authenticity of the exhibits, but not to their relevance, nor the truth of the matters asserted therein.

Discussion and Analysis

Taking the citations in the order presented, I will first deal with Citation No. 2403072, concerning the issue of whether the torque was or was not tested on the roof bolts just outby the accident scene as required by the approved roof control plan.

The Secretary's first witness concerning this part of the case was Mr. Barry Sadler, a miner employed by the Coal Company. He had been working "off and on" as a roof bolter helper on the day of the fatal accident, assisting Bobby Rock, the roofbolter. The job that day was to trim low roof areas along the main track haulageway using a Dosco mining machine. They would first trim the roof with the Dosco, then back the Dosco out so that a roof bolting machine could be brought in, bolt the newly trimmed portions of roof and so on, repeating the process.

Sadler states that they were installing four (4) foot roof bolts on the edges and six (6) foot bolts in the middle. As the bolts were being installed, he asked Rock how well they were anchoring and he (Rock) said they were anchoring "good."

Most importantly to the Secretary's case, Sadler testified that there was a torque wrench on the roofbolting machine but he never observed him (Rock) using the wrench that day. However, he was unable to unequivocally state whether or not he did use it. This was further clarified during cross-examination of Mr. Sadler. He agreed he had spent a considerable amount of time away from the bolter, going back and forth to get bolts, changing bits, and getting cribs. He had also been to lunch while others continued to bolt. The following exchange took place at Tr. 50-51:

Q. Okay. So, you weren't observing the bolter working all day, I take it?

A. No, I only seen him that one time when he was drillin' there, and I seen that little bit of -- it was like, was loose there, you know.

Q. So, Rocky was bolting, Steiner was bolting, Koci, did he do any bolting?

A. Not -- I don't know who was boltin'. They -- they both were supposed to have been boltin'.

Q. Okay.

A. But, I don't know who was boltin', though.

Q. So, it is possible, isn't it, that they, when you weren't watching, they took a wrench out, and --

A. Could of, yeah, right. You mean torquin', you mean, right?

Q. Yes.

A. No, they did -- could have, right.

Q. So, they could have been using the wrench that was on the --

A. Yeah.

Q. Bolting machine, to torque the --

A. Yes, this was --

Q. To check the torque --

A. Yeah.

Inspector Moody also testified concerning this alleged violation. He interviewed Mr. Sadler during the investigation subsequent to the accident. His interpretation of what Sadler told him led him to conclude that none of the roof bolts in the haulageway were being torqued on the day of the accident, and the instant citation was issued on the basis of this conversation with Sadler.

Inspector Moody had also tested the torque on the roof bolts that were installed outby the roof fall area on the day following the accident. He torqued twenty-four (24)

this citation. He said that
Mr. Sadler.

The Secretary's reliance on Sadler to prove up this violation is misplaced. I find that the testimony of Mr. Sadler is at best neutral. He did not see any bolts being torqued, but nor is he able to say how many, if any, were torqued, or that none were torqued. There is simply no direct evidence in this record that the pertinent provision of the roof control plan was or was not being complied with. Additionally, reading the record as a whole, there is no reliable circumstantial evidence to resolve this dilemma either. In short, the Secretary has failed to bear his burden of proof necessary to establish the violation cited in the instant citation, and it must be dismissed.

Curiously, the Secretary did not present any direct evidence from the miners who actually bolted on the day in question as to whether or not they had been complying with the roof control plan concerning checking torque.

The second citation at issue in this case, Citation N 2403074, concerns an alleged violation of Safety Precaution 19(a)(2) of the roof control plan. The Secretary contends that the temporary supports being utilized by the bolters the day in question were inadequate because the applicable provision requires that temporary supports be installed on not more than five-foot centers at the edge of the fall where work is to be started. They were using two rows of jacks, two per row in the unsupported area of the haulage track entry which varied in width, but was greater than 15 feet in some places. Ergo, in those places where the haulage way was greater than 15 feet in width, the supports were on greater than 5 foot centers and there would therefore be a violation of the cited standard.

The respondent, however, contends that Safety Precaution 19(a)(2) applies only where work is being performed at the edge of a fall. It is not contended that the work in question in this case was being performed at the edge of a fall.

The statute and the standard require the parties to agree on a roof-control plan. Once the operator has adopted

we can understand the findings as to what the plan requires. Shamrock Coal Co., 5 FMSHRC 845, 848-52 (May 1983); Penn Allegh Coal Co., 3 FMSHRC 2757, 2769-70 (December 1981). Only after this is determined can those requirements be applied to particular facts to resolve whether a violation of the plan has occurred. Id. The same principle applies to the more basic question of whether a particular provision of the plan is applicable to the situation at hand.

In this case, the paragraph in question (19(a)) begins: "Where roof falls have occurred and at all overcast, boom hole, and other construction sites that require removal of mine roof material...." This main paragraph goes on to require that the roof shall be considered unsupported at all these sites and further that if miners are required to enter any of these enumerated areas, the roof shall be adequately supported. Subparagraph (2) under paragraph 19(a) then specifically addresses only one of the conditions addressed in the main paragraph, i.e., roof falls, stating that "adequate temporary support on not more than 5-foot centers shall be installed at the edge of the fall where work is to be started" (emphasis added).

The respondent argues that this requirement contained in subparagraph (2) addresses a particular type of work site, and there is no indication that it is intended to apply to the other types of work sites addressed in the introductory paragraph. Counsel states in his brief that "[h]ad the parties intended otherwise, they could easily have so provided." I agree they could have easily drafted the requirements more concisely.

On the other hand, the Secretary's position is and Inspector Moody testified that the term "fall" as utilized within Safety Precaution No. 19(a)(2) encompasses not only roof falls with reference to the term "at the edge of the fall," but also, falls of roof caused by the removal of roof by blasting, ripping with a continuous mining machine, or cutting with a cutting machine or other means at the construction site. As a practical matter, this interpretation of the requirement is the only one that makes any sense, reading the paragraph and its subparagraphs together in their entirety. Therefore, I find that the provision of the roof control plan cited in the instant citation is applicable in this case and is sufficiently definite to be legally enforceable.

entry outby the accident scene on the day of the accident.

Inspector Moody testified that he had taken measurements of the entire area that was bolted that day. The width of the entry according to his notes ranged from 14 feet, 10 inches to 18 feet, 6 inches. 1/ He conceded that for those areas in which the entry was sixteen (16) feet wide or less, the use of the two jacks per row would have been adequate and there was no violation. However, in those four areas where the entry was wider than sixteen feet, the company was in violation of the roof control plan, and on that basis, the citation was issued. Inspector Moody calculated the width of the haulageway by measuring the distances between roof bolts placed across the haulageway and then adding up those measurements to obtain a total width. Since the roof bolts were not placed in exactly a straight line across the haulageway, I understand that these measurements would be skewed to the high side. However, I find that the essence of the Inspector's testimony, which I find credible, is that there were four areas wider than fifteen (15) feet bolted that day utilizing temporary supports on centers in excess of five (5) feet in violation of the roof control plan and I so find.

Mr. Remington, the respondent's safety director, also testified that the width of the haulageway is anywhere from fourteen (14) to a little over eighteen (18) feet, "depending on where you measured it up through there."

Mr. James Kaczmark, the mine foreman, had examined the roof in the haulage area that day and had found an area that sounded "drummy." He stated that this did not necessarily mean bad top but you should be cautious of the top. He specifically told his crew to be cautious in securing the roof and he was in the area throughout the shift. This indicates to me that he knew or should have known that his men were not complying with paragraph 19(a)(2) of the roof control plan in those areas of the haulageway that were wider than fifteen (15) feet. His realization that caution was in order in securing the roof should have made him even more aware of the importance of compliance with the roof control

1/ Inspector Moody's notes reflect the following width measurements: 15'5"; 14'10"; 15'6"; 15'0"; 16'2"; 16'11"; 18'6"; and 16'4" (GX-6).

Moody, that the gravity of the cited violation is serious in that even though this violation had nothing to do with the roof fall that did occur later that day, it created the type of hazard that would be reasonably likely to result in a roof fall and serious or fatal injuries to at least one miner. A penalty of \$79 is assessed, as proposed.

Finally, Order No. 2403083 was issued subsequent to a fatal roof fall accident for an alleged violation of 30 C.F.R. § 75.200 (inadequately supported roof).

More specifically, it is the Secretary's position that the roof along the left side of the haulage track rib, for the distance of the overhanging brow, was inadequately supported in that the distances from the rib to the first roof bolt were in excess of five feet in several instances, and that a roof fall did in fact occur in the area which was inadequately supported and one miner was killed.

In order to set the scene where and when the fatal roof fall occurred, it is necessary to go back and reiterate the substance of what had occurred earlier that day.

On the day of the accident, the Dosco miner was bogged down at the beginning of the shift and had to be freed by using cribs to level it. There were places in this haulageway that the Dosco could not be moved laterally because it's weight and the soft ground caused it to sink into the muddy floor. The Dosco has an oscillating head on it which normally would allow the roof to be cut down "rib to rib," but in this instance, it would not go all the way over to the left rib in these muddy and soft areas. Even using cribs to level it, the miner would still sink on the left side making it impossible to get a clean cut on the left. As a consequence, the roof trimming left a brow along the left rib. Further, because the boom of the Dosco was aimed at the left rib, as it mined it deposited debris under the brow. Because the Dosco itself prevented bringing in wagons to load the debris, the respondent planned to remove it after the Dosco had passed through the area, and then secure the brow with cribs.

The roof-trimming operation proceeded that day in a cycle of first cutting with the Dosco, then taking the Dosco out far enough that a roof-bolting machine could be

ing cable and... observed that the cable was hung up in some debris along left rib, under the brow. He went to free it. As he was attempting to free the cable, Sadler, who was approximately eight (8) feet outby Steiner, observed the mine roof dripping. As Sadler yelled a warning, Steiner stepped out into the haulageway where a large rock fell out of the roof, killing him. Shortly thereafter, several feet of roof adjacent to the space left by the rock that killed Steiner also fell.

The respondent's position is that Steiner was killed by a large rock that fell without warning from a roof that was considered excellent, had stood completely unsupported without falls for many years before it was bolted in 1978 and, in addition, was thoroughly bolted at the time it fell.

The Pitt Gas Mine was first opened in 1912 and worked continuously until 1943 when it was abandoned. The mine was reopened in 1978, at which time the new owner bolted the theretofore wholly unsupported haulageway. This haulageway had never had falls in the past and was considered to be "excellent roof in both directions [from the fall] for thousands of feet." It was composed of several inches of roof coal under several feet of sandrock.

As hereinbefore stated, on the day of the accident, Kaczmark had found a portion of the roof "drummy" and had cautioned his men to be careful securing the roof. At the hearing, both he and Safety Director Mel Remington testified that the "drumminess" in the Pitt Gas Mine was not uncommon and was due to the gradual separation of roof coal from the underlying rock. "Drumminess" was not thought to indicate the presence of a "bad top," although it warranted caution due to the possibility that roof coal could fall. Furthermore, the statements of the miners working in the haulageway that day given to the inspectors investigating the accident gave no indication that they observed anything untoward about the roof prior to the fall.

Inspector Moody testified and included in his Report of Investigation that after the accident a slip and clay vein was visible in the haulageway where the roof had

ton inspected the rock that fell on Steiner, as well as each roof bolt recovered from the fall site. He also took measurements of the depth of each bolt hole that was left in the roof following the accident. Respondent's Exhibit No. 1 sets out the results of these measurements and depicts the location of bolt holes in the fall area.

Remington's findings may be summarized as follows:

(1) The rock that killed Steiner was shaped like an elongated triangle or inverted "V" formed by the convergence of two slips.

(2) The base of the "triangle" of rock was approximately 6-8 feet long and the rock was approximately 13 feet wide and 6 feet high from the base to the apex of the "triangle." Three bolts were almost entirely imbedded from the base to the apex of the "triangle" along its width (i.e. across the entry) protruding from 1 to 3 inches through the apex into the solid rock above. A fourth bolt went through the tapered edge of the rock on its left end, anchoring approximately 50 inches into the rock above.

(3) Twenty-nine (29) roof bolts were recovered from the fall site of which twenty-eight (28) had been installed that day as opposed to the 1978 bolting.

(4) The measurement of the holes left by bolts that either came down during the roof fall or were removed during the clean-up indicated that there had been 6-foot bolts along the brow on the left side of the haulageway, directly over the place where Steiner was at the time of the accident. Because no 6-foot bolts had been installed during the 1978 bolting of the haulageway, these were newly installed roof bolts. Therefore, his conclusion was that the roof directly over Steiner at the time of the accident had been bolted that same day with 6-foot bolts.

(5) Roof coal adhered to the base of this rock so that all that was visible from the entry was coal top and coal ribs.

Apropos this last finding, whether the rock that fell out on Steiner was located at the convergence of two slips

itself, without more, conclusive proof that the roof was adequately supported, and therefore a violation of 30 C. § 75.200 is proven. I believe more of a showing of culpability is required. The regulations do not impose absolute liability on operators to be insurers of mine roofs. The regulations do require a reasonable standard of care on part of mine operators to see that their miners are working under adequately supported roof. What is adequate must depend on all the circumstances of which the operator is actually aware as well as those with which he is charged with knowledge of.

Other than the fact that the roof fell, Inspector M is of the belief that the roof was inadequately supported because of the spacing of the bolts and the lack of bolts along the left side of the haulageway for the distance of the overhanging brow. More specifically, the distances from the left-hand rib to the first roof bolt were in excess of five (5) feet in several instances where the overhanging brow ran along the left side of the entry. The longest distance was eight (8) feet, six (6) inches immediately outby the roof fall area.

Mr. Sadler testified that this was because of the overhanging brow and the debris located along the left rib. He stated that they were bolting as near to the lip as they could. Otherwise, they were bolting on approximately five to five foot centers. The brow itself was approximately two (2) to three (3) feet wide. Therefore, the measurement between the edge of the brow and the first bolts would be approximately three (3) to six (6) feet varying along its length.

The respondent's evidence regarding the adequacy of bolting in the roof-fall area and immediately outby the accident scene is credible and convincing. That evidence, depicted on Respondent's Exhibit No. 1, shows the location of 29 roof-bolt holes and their measured depth in and immediately outby the fall area. They represent twenty-nine and 6 foot roof bolts installed on approximately 4-5 foot centers throughout the area of the fall. Twenty-eight of them had been installed on the very day of the accident.

the solid strata above and 100' because they were put into the apex of the inverted "V," which was approximately six (6) feet thick. They anchored into the rock itself. The holes of these three bolts are depicted and circled on Exhibit No. R-1 as extending 3", 1", and 2" into the mine roof, from right to left, respectively. The fourth bolt (also circled in blue on R-1) went through the edge of the rock and anchored some 50" into the strata above, but was obviously not enough to hold the rock up by itself.

There has been no allegation that the respondent violated it's roof control plan with regard to the number of roof bolts installed in this area or their pattern of installation. While the Secretary correctly points out that it is not necessary to prove a violation of the roof control plan in order to sustain a violation of 30 C.F.R. § 75.200, the evidence must show that the operator knew or should have known that a condition existed that required additional support and yet it was not provided.

Inspector Robert E. Swarrow issued the instant § 104(d)(1) order on October 10, 1984, the day after the accident. He testified concerning that issuance at Tr. 185:

Q. Okay. And, did you and Mr. Moody talk about this Citation?

A. Yes.

Q. Did you and he agree that this Citation should be issued?

A. Yes.

Q. And, upon what basis?

A. The mine roof in that area was not adequately supported.

Q. In your opinion, why wasn't it adequately supported?

A. Because the roof fell.

Q. Any other factors?

A. No.

have an inadequately supported roof?

A. I believe that would be a good position.

* * *

Q. I didn't ask you that. You testified that because there was a fall there, you concluded the roof was inadequately supported, and that's your position?

A. That's correct.

I have to agree with the respondent's assertion these two inspectors apparently decided a day after the accident and before the investigation was fairly understood alone completed, that there is a violation of 30 C.F.R. § 75.200 any time a roof falls. Consequently, they apparently did not think it necessary to investigate much more than documenting the fact of the roof fall itself and the tragic death of Mr. Steiner. Most importantly, they failed to produce any evidence to the effect that any objective signs existed prior to the accident that would have alerted a reasonably prudent mine operator to a condition that required roof support over and above that normally required.

In summary, the Secretary has not borne his burden of proof to demonstrate that the area was inadequately supported considering the circumstances that the operator either actually knew or with due diligence could have ascertained prior to the accident. For the reasons stated herein, Order No. 2403083 is dismissed.

ORDER

Based on the foregoing facts and conclusions of law, I enter the following order:

1. The motion for approval of settlement concerning Citation No. 2403073 is granted and a penalty of \$5800 is assessed.

2. The motion for approval of settlement concerning Citation No. 2403082 is granted and a penalty of \$9800 is assessed.

5. Order No. 2403083 and all penalties therefor are vacated.

Accordingly, the respondent is ORDERED TO PAY the sum of \$235 within 30 days of the date of this decision.

A handwritten signature in black ink, appearing to read "Roy J. Maurer", is written over the typed name.

Roy J. Maurer
Administrative Law Judge

Distribution:

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GARY HENSLEY, : DISCRIMINATION PROCEED
Complainant :
v. : Docket No. KENT 86-3-D
: MSHA Case No. BARB CD
HARLAN WALLINS COAL COMPANY, :
Respondent : No. 1 Mine

DECISION

Appearances: Gary Hensley, Wallins, Kentucky, pro se;
Karl Forester, Esq., Forester, Forester,
Buttermore, & Turner, Harlan, Kentucky,
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint by the complainant Gary Hensley against the respondent ant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Hensley filed initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Hensley filed his pro se complaint with the Commission. A hearing was conducted in Duffield, Virginia.

The complainant alleges that he was discharged by the respondent for refusing to do work in the underground mine operated by the respondent. The complainant maintains he was hired as an "outside man," had no prior underground mining experience or training, and that the respondent's request for him to work underground made him nervous.

Issue

The issue in this case is whether the complainant's refusal to follow the instructions of mine management

2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Procedural Matters

The hearing in this case was scheduled to begin at 9:30 a.m., on March 26, 1986, and the parties were so informed by my notice of hearing of February 21, 1986. In view of the fact that the complainant failed to appear at the appointed hour, I delayed the beginning of the hearing until 9:55 a.m., and made an attempt to contact the complainant by telephone at his residence but no one answered the phone. The respondent's counsel moved to dismiss the complaint because of the failure of the complainant to appear and prosecute his complaint. I reserved my ruling on the motion and closed the hearing at 10:00 a.m. After this was done, the complainant appeared, and the hearing was reconvened at 10:10 a.m. The complainant explained that he arrived late at the hearing because he was looking for a witness but could not find him. I advised the parties that I intended to proceed with the hearing, and respondent's counsel declined my invitation to comment and did not object (Tr. 3-9).

The record in this case reflects that the respondent was initially represented by Counsel Rodney E. Buttermore, Jr., of the firm Forester, Forester, Buttermore & Turner, Harlan, Kentucky. Mr. Buttermore filed his notice of representation and filed all prehearing pleadings on behalf of the respondent. On Monday, March 25, 1986, the day before the hearing, my secretary received a telephone call from Mr. Buttermore's secretary or associate informing her that Mr. Buttermore was out of the country, would be unable to attend the hearing, and a continuance was requested. I telephoned Mr. Buttermore's office and discussed the matter with Mr. William Forester, a member of the firm. Mr. Forester could offer no explanation as to why Mr. Buttermore had not informed me earlier of his departure from the country, and expressed his apologies. I informed Mr. Forester that I intended to proceed with the hearing as scheduled, and he assured me that someone from his office would

commencement of the hearing, Mr. Forester was afforded an opportunity to review the official file in this matter, and he did so.

Discussion

Mr. Hensley filed his discrimination complaint with MSHA's District 7 Office on July 25, 1985. His complaint states as follows:

On July 13, 1985, I reported for work as usual. The mines was going to do dead work. When I got there (2d shift), the section boss, Don Curtis, told me they wanted me to go inside to help clean up, shovel and stuff like that. I told him I was not going inside cause I had never worked in the mine before and had never had any training. Curtis asked me if I wanted to tell him to tell Jr. (Cletis Robbins), I told him no, I'd tell him, which I did. Robbins told me I could either go inside or go home cause they were not running coal and had nothing for me to do on the outside. I told him Okay and left.

By letter dated September 4, 1985, MSHA's district manager advised Mr. Hensley that MSHA conducted an investigation of his complaint, and that based on its review of the information gathered during the investigation, MSHA determined that a violation of section 105(c) of the Act had not occurred. Mr. Hensley was informed of his right to pursue the matter further with the Commission.

By letter dated September 29, 1985, Mr. Hensley filed his complaint with the Commission. His letter states in pertinent part as follows:

I was hired by Gus Robbins (Cletis Robbins, Jr., brother and his boss). Gus told me when I was hired my job was to run the end loader and to answer the outside phone, watch the outside belt head and grease. I was the outside man.

did not answer him right away. One of the workers told me if I wanted to keep my job I better go inside the mine and work so I did. This left no one outside that night to answer the phone or anything. I worked 9 or 10 hours inside that night with the electrician. I came outside about 2 or 3 a.m. with one of the ram car drivers to throw the disconnects in with a hot stick. The power was off most of that night inside the mines. I thought that was the last and only night I would have to go inside and work. I was not hired as an inside coal miner. This inside mining work made me nerves (sic) and worried me.

Testimony Presented by the Complainant

Complainant Gary Hensley testified that on July 13, 1985, he reported for work on the second shift and was advised by foreman Don Curtis that Mr. Cletis Robbins wanted him to go in the mine and work that evening. Mr. Hensley told Mr. Curtis that he did not care to work inside the mine because he had no underground training or experience. He reminded Mr. Curtis that he was hired to work outside the mine answering the mine phone or doing what was needed on the outside. Mr. Hensley confirmed that he then spoke with Mr. Robbins and told him that he did not care to go underground to work, and that Mr. Robbins responded "Well, go home. You're fired" (Tr. 11-12).

Mr. Hensley stated that a month or so prior to his discharge Mr. Robbins asked him if he had any underground experience or training and that he told him that he did not. Mr. Hensley stated that he had not previously worked around coal mines and that his job with the respondent was his first mining job. He confirmed that he had driven a coal truck since he was 18 years old (Tr. 12).

Mr. Hensley stated that on one prior occasion before his discharge he did work underground at Mr. Robbins' request, and that this was the same night that Mr. Robbins asked about his training. Mr. Hensley stated that he worked underground that night because he needed the job and was afraid of being fired. He confirmed that no coal was being mined that night

ment was July 13, 1985, the evening he was fired (Tr. 15). He confirmed the accuracy of his prior statement in the complaint filed with the Commission which indicates that Mr. Robbins told him he could either go inside the mine or home because the mine was not running coal that day and there was nothing for him to do on the outside, and that he (Hensley) replied "Okay" (Tr. 15-16).

Mr. Hensley confirmed that when Mr. Robbins fired him was done orally and he was not given anything in writing. He stated that he was concerned about working underground even though coal was not being mined because no one would be on the outside to contact in the event of an emergency. He confirmed that he voiced no objection to working underground on the prior occasion because one of his friends told him that if he refused, he would be fired. He also stated that since he had never worked underground before "I just went ahead and went to see what it was like anyway" (Tr. 18).

Mr. Hensley stated that since his discharge he has been employed as a tractor trailer truck driver on a part-time basis for a friend from October, 1985, to the present (Tr. 20).

On cross-examination, Mr. Hensley stated that his last day of employment was a Saturday, and while the mine was closed for vacation the week before, he did not believe it was closed for the week immediately preceding his discharge. He confirmed that the mine was not running coal on July 13, the day he was fired, and that he was asked to go inside to shovel muck (Tr. 20). He explained that he was asked to go inside the underground mine to shovel under the belt line and to clean up the trash. He was told that once he was through with that work, he was to ask Mr. Curtis what else was needed to be done. He confirmed that he chose not to go inside and work (Tr. 21).

Mr. Hensley reviewed a copy of his July 25, 1985, statement made to MSHA, and confirmed that it does not contain a statement that he had been fired. He explained that he did state that he had been fired and "They just didn't write it on there, I guess" (Tr. 22). He stated that the following Monday he telephoned Gus Robbins to make sure he knew about

mine management does know about any danger or unsafe conditions in the mine, and that he was treated just as the other workers at the mine were treated. He denied that when he was hired he told Mr. Gus Robbins that he had worked "over on the north side of Pine Mountain" (Tr. 23). He also denied that he told Cletis Robbins "I aint going to muck that belt" when they had the conversation on July 13 (Tr. 23).

Mr. Hensley confirmed that he did work underground on another occasion with Gus Robbins during vacation and that he had forgotten about it. He stated that the work entailed pulling a miner cable (Tr. 23-24). In response to further questions from the bench as to why he believes he has been discriminated against by the respondent, Mr. Hensley responded as follows (Tr. 24-27):

A. Well, the way I figured it, I was hired for outside -- outside man. They asked me to go underground. I never had no training or any experience underground. I didn't feel I should've been underground.

Q. The couple or three times you were underground, they weren't running coal. Right?

A. Right.

Q. They just wanted you to go in there and muck?

A. Yes.

Q. Which, I understand, is kind of a nasty job, isn't it?

A. Yeah. But I never mucked none. Both times, I never mucked no coal both times I went underground.

Q. What's involved? All you do is take a shovel and shovel it?

A. Shovel under the belt and throw it up on top of the belt.

A. The mine just scared me. I didn't like it inside.

Q. Even though it was dead work and no coal being run?

A. Right.

Q. Did you believe, when you took the job there, there was a possibility you'd be called on to do work other than just outside work?

A. No, I didn't, because when Gus came down to my house and hired me, I asked him what I had to do. He said, "All you have to do is run the endloader and answer the phone, take care of what needs to be done outside."

Q. Where did you operate the endloader, outside?

A. Yeah.

Q. All the time?

A. Yeah, backing coal back on the belt line.

Q. Mr. Forester asked you a question about the one time you were underground working at the portal. The portal is the entrance to the mine, right?

A. Yeah.

Q. Is that where you were working?

A. No.

Q. You never worked near the portal?

A. Yeah, I shoveled coal.

they had the miner and stuff.

Q. Did you help the electrician?

A. Yes.

Q. Did you at any time complain to anybody that was there? Did they have a section foreman there?

A. Yeah, Don Curtis.

Q. Did you say anything to them?

A. No. No, I didn't want to get fired or nothing, you know. I wanted to keep working.

Respondent's Testimony

Gus Robbins, confirmed that he is the president of the respondent coal company, and that he has 10 years of mining experience. He described the mine as a conventional coal mining operation using a continuous miner. The mine works two shifts a day, and the coal is mined during the second shift, and loaded on trucks on the day shifts. The coal is transported to the belt line by tractors, and once out of the mine, it is hauled to a processing plant by truck. The mine has been in operation for approximately 4-1/2 years, and it employs 20 miners.

Mr. Robbins stated that he hired Mr. Hensley in May, 1985 to replace an outside man who had quit. Mr. Robbins stated that Mr. Hensley was previously employed as a truck driver hauling coal from the mine, but that he was laid off. Mr. Hensley asked him for a job, and Mr. Robbins went to his home and hired him. Mr. Robbins stated that when he hired Mr. Hensley, he explained that his primary job would be outside work, but made it clear to him that there would be occasions when he would be required to check the belt line and to keep it clean and free of muck at the portal and mouth of the drift. Mr. Robbins indicated that he explained the duties of the job to Mr. Hensley, instructed him as to what would be

shape" to resume production after vacation. Mr. Robbins stated that he posted a notice on the mine bulletin board stating the work that would be required during the vacation period, and that this work was done on the first shift. Although Mr. Hensley normally worked the second shift, he asked to work the first shift to help out during the vacation period.

Mr. Robbins stated that at the time he asked Mr. Hensley to help out during the vacation week, he asked him if he had prior underground experience. Mr. Hensley told him that he "had a little time across the mountain," and Mr. Robbins took this to mean that he worked at mines at Pine Mountain. Mr. Robbins stated that he advised Mr. Hensley that he would be working with the vacation crew cleaning up the air course and helping to drag cable for a continuous miner which was brought in to help clean up the mine. Mr. Robbins stated that Mr. Hensley agreed to do this work and at no time complained to him about the work, or the fact that he would be required to be underground. Mr. Robbins stated that when he informed Mr. Hensley that he would be underground helping keep the cable out of the way, Mr. Hensley responded "Yeah, no problem. I don't care" (Tr. 35).

Mr. Robbins stated that Mr. Hensley worked for 3 days underground during the vacation period in question, and that he helped drag the continuous miner cable. He also was in and out of the mine getting tools and otherwise helping Mr. Robbins who was performing maintenance work on the continuous-mining machine. In addition to Mr. Robbins and Mr. Hensley, there were three other miners and a foreman present on the first shift during the vacation work. Mr. Robbins stated that during this period Mr. Hensley did not complain about the work, voiced no safety or other concerns about being underground, and in fact stated that he had no problem in pulling the cable.

Mr. Robbins produced copies of the mine payroll records for the vacation period in question, and he confirmed that the records reflect that Mr. Hensley worked 30 hours that week. Although the records do not reflect the number of days worked, Mr. Robbins stated that he can personally confirm

... confined to general clean-up duties, dragging or moving material, and bringing tools in and out of the mine.

Mr. Robbins stated that he was not present on Saturday, July 13, 1985, when his brother Cletis, or "Junior," spoke with Mr. Hensley about his refusal to muck the belt. Mr. Robbins denied that Mr. Hensley was fired, and he stated that had he been fired, his "time clock" work record would have been so noted. Mr. Robbins stated that it was his opinion that Mr. Hensley voluntarily quit his job. He confirmed that the mine work records reflect that Mr. Hensley worked 60 hours for the week ending July 13, 1985, and that he worked 30 hours for the week ending July 6, 1985 (Tr. 40).

In response to questions by Mr. Hensley, Mr. Robbins confirmed that he spoke with Mr. Hensley by telephone on Monday, July 15, and that Mr. Hensley asked him if he had been fired. Mr. Robbins stated that he informed Mr. Hensley that "he needed to get with Cletis Robbins. To my knowledge, he hadn't told me anything about it if he fired anybody, and he needed to see Cletis Robbins" (Tr. 37).

Cletis Robbins, Jr., testified that he has 10 years of mining experience and that he is the mine superintendent. He confirmed that he is the brother of Gus Robbins, and is known as "Junior." He stated that he worked the first shift and part of the second shift. Mr. Hensley worked the second shift (Tr. 44).

Mr. Robbins stated that he was on vacation during the first week of July, 1985, and returned the following week. He confirmed that on Saturday, July 13, 1985, he determined that work had to be performed underground on the belt line while coal was not being produced, and he instructed section foreman Don Curtis to inform Mr. Hensley that he would be expected to "muck out the belt" at the portal and under the belt as required. Mr. Robbins estimated that there was 8 to 10 tons of coal which had to be cleaned up, and the only way to do this was to shovel or "muck it" manually. Most of the work was required to be done at the portal or close to it.

Mr. Robbins stated that after he advised the second shift crew as to the work that was expected to be done, Mr. Hensley informed him that he would not do the mucking work. Mr. Robbins stated that he informed Mr. Hensley that this was

A. And when he came in, he told me, "I'm not going to muck that belt." I just turned around and told him, I said, "Well, that's all I've got for you to do." And he said, "Well," he said, "That's okay," and he turned around and left and I never seen him again.

Q. You heard his testimony that you fired him at that time. Did you or did you not?

A. I never did tell him he was fired.

Q. Now, you indicated you told him that he would be -- or Don Curtis told him he would be mucking the belt at the portal. What is a portal?

A. That's a canopy going back into the mines.

Q. And you were talking about the belt that carried the coal out of the mine?

A. Yes.

Q. How much work was there to be done there?

A. I'd say about eight or ten ton.

Q. How was this work to be done?

A. With a shovel, manually.

Q. Was this location very near the entry of the mine or the portal of the mine?

A. Yes.

Q. Had it been daylight at the time, could the work have been done without even having a light -- a cap and light?

A. It could've been until it got dark.

expected to do other work assigned to him (Tr. 47).

In response to questions by Mr. Hensley, Mr. Robbins confirmed that Mr. Hensley never complained about his outside work or the belt mucking work at the portal. He conceded that at the time Mr. Hensley refused to work on the belt on July 13, he (Robbins) told him to "go home." Mr. Robbins stated that the outside job vacated by Mr. Hensley was left open for a week before someone was hired to fill the job (Tr. 48).

Don Curtis, respondent's section foreman, testified that he has 18 years of mining experience and is a certified mine foreman. He confirmed that he was on vacation during the mine vacation week and that he worked the second shift during the period May through July, 1985. On Saturday, July 13, 1985, the second shift was in the process of cleaning and dusting the underground belts and no coal was being mined. He assigned men to clean up all along the belt line, and he intended to assign Mr. Hensley to clean the first belt next to the outside drift mouth of the mine. However, as soon as he told Mr. Hensley that he was going inside the mine to clean and muck the belt, Mr. Hensley informed him that he was not going. He heard Mr. Hensley inform Cletis Robbins that he would not work on the belts and Mr. Robbins told Mr. Hensley that there was no other work to do that evening. Mr. Curtis did not hear Mr. Robbins tell Mr. Hensley that he was fired (Tr. 49-52).

Mr. Curtis stated that Mr. Hensley worked one prior evening underground while a section was being moved. Mr. Hensley did not complain to him about working underground on that occasion, never complained about any safety problems, and never complained that the company was discriminating against him in any way (Tr. 52-53).

Mr. Curtis stated that on July 13, he had no idea why Mr. Hensley was reluctant to do the mucking work and that Mr. Hensley gave him no reason. He simply told him that he was not going to do the work (Tr. 54).

Mr. Hensley was recalled, and he stated that after his termination he did not speak with anyone about getting his

which had fallen off the belt at the outside port, but not consider the work hard and it did not bother him. coal would often accumulate knee deep in that location came out of the mine and he often spent three or four night shovelling it (Tr. 57).

Mr. Hensley confirmed that at the time Mr. Gus Robbins assigned mine personnel to work inside the mine during the time he (Robbins) explained to everyone what had to be done. Mr. Hensley explained further as follows (Tr. 58-59):

A. Yes, he explained it. He said he wanted to pull a cable behind the miner and the man that was there that run the miner was the day shift foreman, and he kept me outside as much as he could because he knew I didn't like going inside. I stayed out one day and taped up cable and stuff for the miner. He done that to keep me from going inside because he knew I didn't like going inside.

Q. But the time you went inside, did you, in fact, take care of the cable?

A. Yes.

Q. Do you recall Mr. Robbins' testimony about him requiring you to go in and out to carry tools?

A. Yes, I carried tools to him several trips.

Q. That did happen?

A. Yes.

Q. So, I take it in a nutshell, your reluctance was to be underground -- regularly working underground?

A. No.

Q. You didn't like that?

production, but just bringing tools in and out, that that caused you some problem, too?

A. Yeah. I didn't like going in underground. It shook me up. I was scared of it.

Q. Well, now when you were first hired, you heard the testimony of Mr. Robbins that he indicated to you that most of the time, you'd be expected to work outside, but there were occasions when they may have to call on you to do work --

A. He never said that to me. He just told me what I stated awhile ago about just running the highlift and taking care of anything outside. He never mentioned anything about going in underground.

Q. Well, let's assume you had no work outside to do on a given day -- had that ever happened?

A. They'd break down at night sometimes and wouldn't run no coal, and I'd just stay outside. They'd come out and get parts. I'd get the parts for them.

Q. What would you be doing?

A. I would grease, check oil and stuff. Grease the outside belt line, fuel the highlift up.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining mine bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211

ner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C. Cir. (April 20, 1984) (specifically-approving the Commission Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____ U.S. _____, 76 L.Ed.2d 667 (1983).

One critical issue in this case is whether or not Mr. Hensley was discharged because of his refusal to perform work assigned to him by foreman Don Curtis and/or mine superintendent Cletis Robbins. The respondent suggests that Mr. Hensley voluntarily quit his job and was not fired, and Gus and Cletis Robbins testified that they never specifically told Mr. Hensley that he had been fired. Mr. Hensley's first complaint to MSHA on July 13, 1985, contains no assertion that he had been fired. Mr. Hensley's complaint letter of September 29, 1985, to the Commission contains a passing reference to the purported firing.

Mr. Hensley's termination occurred on a Saturday. It is clear that it came about as a result of Mr. Hensley's refusal to work underground cleaning the belt, and after some conversation between Mr. Hensley and Cletis Robbins. Mr. Hensley's earlier statement to MSHA is that when Mr. Robbins advised him that there was no outside work to be done and gave him a choice to either go underground or go home, Mr. Hensley responded "o.k." and opted to go home. Mr. Robbins' testimony at the hearing is consistent with this earlier version. However, at the hearing, Mr. Hensley testified that when he opted to go home rather than work underground, Mr. Robbins told him that he was fired. Mr. Hensley made no attempt to get his job back, did not report to work on the following Monday, but instead telephoned Gus Robbins to inquire as to whether he knew that Cletis Robbins had fired him. Gus Robbins' response was "whatever Junior (Cletis) says goes." Foreman Curtis confirmed that after Mr. Hensley's work

(Tr. 37)). Mr. Robbins stated that Cletis Robbins said nothing to him about firing Mr. Hensley, and that his work records do not reflect that he was discharged. Cletis Robbins testified that after he told Mr. Hensley to go home, he got his dinner bucket and went home, and he heard nothing further from him. Mr. Robbins also testified that Mr. Hensley's job was left open, and a week passed before it was filled. He denied that he hired a replacement that same weekend (Tr. 48).

After careful consideration of all of the testimony in this case, I cannot conclude with any degree of certainty that Mr. Hensley was in fact directly fired by mine superintendent Cletis Robbins. However, on the basis of the circumstances surrounding this incident, including Mr. Robbins' statements and actions when he gave Mr. Hensley the option of working underground or going home, I conclude that Mr. Hensley was "constructively discharged" by Mr. Robbins on July 13, 1985. Given the option of working or going home, Mr. Hensley's choice of the latter, his failure to report for work the next available work day, and his subsequent telephone call to Gus Robbins lead me to conclude that Mr. Hensley had reasonable grounds for believing that he had been discharged.

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub 'nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir. 1985). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

Although not directly stated as such, Mr. Hensley's complaint implies that his work refusal of July 13, was based on the fact that he lacked prior underground experience and training. In his original written complaint to MSHA,

Gus Robbins testified that he hired Mr. Hensley because "he seemed like a pretty good guy who wanted to work" (Tr. 31). Mr. Robbins explained that he knew Mr. Hensley as a truck driver who regularly hauled coal from the mine, and that when he was laid off from his driver's job he (Hensley) asked him for a job. Mr. Robbins further explained that he went to Mr. Hensley's home to hire him, and then took him to the mine to explain the work expected of him and to familiarize him with the mine and to explain mine safety precautions.

Gus Robbins testified further that answering the telephone and operating an endloader were not full-time duties and that Mr. Hensley was expected to do other work as assigned, i.e., checking the belt line as it entered the mine to insure that it was working, and mucking the belt. Mr. Robbins confirmed that Mr. Hensley had always mucked around the belt by the portal, and that this was part of his job. Mr. Robbins impressed me as a credible witness, and his testimony regarding the work expected of Mr. Hensley when he was first hired was confirmed by Mr. Hensley's testimony that he often spent 3 hours an evening shovelling and mucking the belt area near or inside the portal and that he did not consider this to be hard work.

There is no evidence in this case that Mr. Hensley ever communicated his fear of underground work or lack of training to the respondent. There is nothing in the record to support Mr. Hensley's assertion that his failure to object to working underground prior to July 13, was because of his fear of being fired. As a matter of fact, Mr. Hensley's prior written complaints made no mention of this concern on his part, and he testified that when called upon to work underground the first time, he did so "to see what it was like" (Tr. 18). Further, the evidence in this case establishes that at no time during his employment with the respondent did Mr. Hensley ever complain about his asserted fear of working inside the mine. He filed no safety complaints with MSHA or mine management, expressed any concerns for his safety, and never objected to working underground. Mr. Hensley confirmed that he was treated like all other miners, and there is no evidence of animosity towards him or mistreatment by mine management.

notice at the mine informing mine personnel of the work to be done cleaning up the air courses, moving a miner in, and "getting the mine in shape." Although Mr. Hensley normally worked the second shift, which was the production shift, he was assigned to the first shift to help do the vacation week "dead work." Mr. Hensley confirmed that Mr. Robbins explained what work was to be done during this time, and at no time did he voice any safety or lack of training concerns.

Although Mr. Hensley testified that he only worked one day underground during the vacation period, the credible testimony of Gus Robbins indicates otherwise. Mr. Robbins testified that he personally worked underground with Mr. Hensley periodically for at least 3 days during the vacation period and the mine records establish that during that week Mr. Hensley worked a total of 30 hours.

Mr. Robbins testified that during the vacation work, Mr. Hensley helped to pull the miner cable to keep it clear of the miner which was mucking. Mr. Hensley did not object, and instead stated that he had "no problem and didn't care." When the miner experienced some hydraulic problems, Mr. Hensley was in and out of the mine periodically assisting Mr. Robbins by bringing in tools and parts as required by Mr. Robbins while he was repairing the miner. Mr. Robbins stated that Mr. Hensley was in and out of the mine "numerous times" during this period, and that they were no further than 450 to 500 feet inside the mine. Mr. Hensley confirmed that he was in and out of the mine helping Mr. Robbins, and there is nothing to suggest that he voiced any safety or lack of training concerns.

Mr. Hensley's contention that he had no prior training and no formal underground mine training while employed by the respondent stands un rebutted. The respondent produced no testimony or evidence to establish that Mr. Hensley received any formal training while in its employ. I take official notice of MSHA's training requirements found in Part 47, Title 30, Code of Federal Regulations, and recognize the fact that placing an untrained miner underground may constitute a violation of MSHA's mandatory safety or training requirements. However, there is no evidence in this case that the respondent has ever been cited for any such violation, and there

worked as a coal haulage truck driver stands unrebutted by the respondent. Although Gus Robbins alluded to certain statements attributed to Mr. Hensley that he previously "had a little bit of time across the mountain" (Tr. 35), that statement was not further explained, and there is no credible evidence supporting any inference or interpretation that that statement, if made and standing alone, indicates that Mr. Hensley had prior underground mining experience.


Taken at face value, the lack of training and prior underground experience could conceivably support an inference that Mr. Hensley's refusal to work underground on July 13, was out of concern for his safety. However, given the fact that Mr. Hensley voiced no safety concerns when he refused work, the fact that he had previously worked underground without objections, the fact that his previous work was always done when the mine was down and out of production and while he was under the direct supervision of an experienced mine foreman and mine operator, and the fact that Mr. Hensley has never voiced any safety complaints or concerns when asked to perform certain intermittent work underground leads me to conclude that any claim by Mr. Hensley that his work refusal was prompted out of concern for his safety is unsupported.

There is no evidence in this case that the underground work required of Mr. Hensley exposed him to any safety hazards. The record establishes that in each instance when he was assigned underground work, it entailed trips in and out of the mine bringing in tools, cleaning up the belt, assisting in the dragging of a cable, and helping an electrician take some equipment outside. In each instance, the mine was not producing coal and was down for "dead work." Mr. Hensley was apparently provided with a hard hat and a flashlight, the mine operator had briefed him on safety precautions when he was first hired, and he was always under the supervision of experienced mine personnel. Further, Mr. Gus Robbins' unrebutted testimony, which I find credible, reflects that when the mine was down during the vacation for "dead work," Mr. Robbins posted a notice on the bulletin board announcing the work to be done, and that when he explained this to Mr. Hensley he did not object, and state that he didn't care and had no problem.

that the job would only require him to answer the telephone, operate an endloader, and do other outside work.

In his complaint to the Commission, Mr. Hensley makes no mention of the fact that he worked underground during the vacation period which was testified to during the hearing. In referring to the one prior occasion when he did work underground, Mr. Hensley alluded to the fact that he was not hired as an inside man, and that he believed that this would be the last and only time he would be asked to work inside the mine. In response to questions during the hearing as to why he believed he was discriminated against, Mr. Hensley indicated that since he was scared of being underground and that "it shook him up," he was reluctant to work underground on a regular basis, even during the time when the mine was out of production and only "dead work" such as belt cleaning and mucking was being done. Under these circumstances, I conclude that even if he had formal training, Mr. Hensley would still be reluctant to work underground because of his personal dislike for the underground environment and his preference to do the outside work for which he believed he was originally hired. I further conclude that Mr. Hensley's refusal to work on July 13, was based on his belief that mine management's work assignments requiring him to go inside the mine when it was out of production were becoming more and more routine and that unless he resisted, he would soon find himself performing more work which he did not believe should be assigned to him as an "outside man."

In view of the foregoing findings and conclusions, I cannot conclude that the record in this case supports a conclusion that Mr. Hensley's refusal to follow mine management's work assignment on July 13, 1985, was based on a reasonable good faith belief on his part that the performance of the work would expose him to any underground safety hazards. I further conclude and find that Mr. Hensley's assertion that his work refusal was prompted by his lack of training and experience is not bona fide. Accordingly, the complaint IS DISMISSED, and the requested relief IS DENIED.


George A. Koutras
Administrative Law Judge

Karl Forester, Esq., Forester, Forester, Buttermore & Turne
P.S.C., P.O. Box 935, Harlan, KY 40831-0935 (Certified Mail

/fb

May 2, 1986

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 85-32-D
ON BEHALF OF	:	MSHA Case No. NORT CD 84-7
RL KENNEDY,	:	
RY COLLINS,	:	Mine No. 1
Complainants	:	
v.	:	
	:	
VEN RED ASH COAL	:	
CORPORATION,	:	
Respondent	:	

AMENDED DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for the Complainants;
Daniel R. Bieger, Esq., Copeland, Molinary &
Bieger, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

By motion filed April 23, 1986, the Secretary requests that I reconsider my decision of April 7, 1986, with respect to the applicable interest rate to be applied to the back pay awarded the complainants. The Secretary states that the interest rates for part of the back pay periods in question should be more than 9 percent referred to in my decision. The Secretary seeks leave to compute and file the necessary interest computations to cure the minor defect in my decision.

Commission Rule 65, 29 C.F.R. § 2700.65, authorizes the Judge to correct clerical mistakes and errors arising from oversights or omissions in his decision. I consider the subject matter of the Secretary's request to fall within the rule. Accordingly, the Secretary's motion IS GRANTED, and my decision is amended as follows:

Complainant shall submit a statement no more than 30 days after the date of this Amended Decision stating the total amount of interest that is due on the back wage award to each employee, to the date of this Amended Decision. Respondent shall have 10 days from the date the statement is submitted to reply.

3. The second full paragraph on page 40 is replaced by the following:

This order is not final until the exact amount due is determined and ordered to be paid.

4. Footnote 1 on page 40 is deleted.

The Amended Decision should now read as follows:

ORDER

The respondent IS ORDERED to pay the complainant Earl Kennedy the sum of \$2,170, less any amounts normally withheld pursuant to state and Federal law, with interest to the net back-pay award in accordance with the Commission-approved formula set out in Secretary ex rel. Bailey v. Arkansas-Coca-Cola Co., 5 FMSHRC 2042, 2050-2054 (Dec., 1983).

The respondent IS ORDERED to pay the complainant Larry Collins the sum of \$10,600 less any amounts normally withheld pursuant to state and Federal law, with interest to the net back-pay award in accordance with the Commission-approved formula set out in Secretary ex rel. Bailey v. Arkansas-Coca-Cola Co., 5 FMSHRC 2042, 2050-2054 (Dec. 1983).

Complainant shall submit a statement no more than 30 days after the date of this Amended Decision stating the total amount of interest that is due on the back wage award to each employee, to the date of this Amended Decision. Respondent shall have 10 days from the date the statement is submitted to reply.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

RONALD A. FAUST,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 85-116-DM
v.	:	MD 84-39
	:	
ASAMERA MINERALS (U.S.),	:	Gooseberry Mine
INC.,	:	
Respondent	:	

DECISION

Appearances: Mr. Ronald A. Faust, Sparks, Nevada,
pro se;
Craig Haase, Esq., Haase, Harris & Morrison,
Nevada,
for Respondent.

Before: Judge Morris

This case arose upon a complaint of discriminatory discharge filed by the complainant with the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act 1977, 30 U.S.C. § et seq., (the Act). The Secretary, after investigation, declined to prosecute the complaint. The complainant, Ronald A. Faust, then brought this proceeding directly before this Commission as permitted under section 105(c)(3) of the Act.

Complainant alleges he was discharged in violation of section 105(c)(1) of the Act. 1/ After notice to the parties, a hearing was held in Reno, Nevada on March 12, 1986.

Complainant was granted leave to file a post-trial submission but no such brief nor request for any extension was filed.

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory right of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such representative of miners or applicant for employment has filed a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or

(footnote continued)

activity protected by the Act.

The Commission case law requires that in order to establish prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1101 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Mine Workers of America v. Consolidation Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the same adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1946-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Bovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

The evidence shows that Ronald A. Faust, 32 years of age, employed by respondent Asamera Minerals (Asamera) from

1/ continued

representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by

of mined ore, gold and silver ore (Tr. 12). Faust's wage was \$10.50 an hour. It was later increased to \$11 (Tr. 12).

On July 30th Faust with his partner blasted 30 holes in the stope. The blast brought down the raise. As a result the scramble between raises 806 and 805 was plugged off because it filled with sand (Tr. 13-16, 20). In order to breathe Faust reduced the air pressure and breathed off of the air hose for about an hour, or until the air cleared (Tr. 14). Breathing off of the air hose caused Faust's lungs to become coated with oil (Tr. 14).

The following morning Faust went to St. Mary's Hospital where he remained for six days. A portion of the time he was in intensive care (Tr. 15).

After he returned home he did not return to work at Asamera. He was fired by his manager, Tom Lambert, for blasting in the stope (Tr. 17, 20). At no time did Faust have any conversations with the company about such blasting but he asserts it was common practice to remain in the stope while blasting (Tr. 18). Faust offered several written statements by coworkers confirming his testimony concerning blasting in the stope (Tr. 18, 19; Ex. C1 thru C5).

Faust had never been told how he should have blasted in the stope. On five prior occasions when he had blasted it had cleared in 10 minutes because the ventilation had remained open (Tr. 24). Faust's supervisor obtained the blasting material; he knew each time Faust blasted (Tr. 24, 25).

Complainant indicated that he had never told anyone at Asamera that there was a safe or unsafe way to blast (Tr. 25).

At the hearing Faust identified and read his original statement to MSHA (Tr. 27; Ex. C6). He basically reviewed his statement (Tr. 27-31). The handwritten statement concluded with several questions. They were: "why wasn't accident reported by mine?" and "why hasn't 805 raise been maintained?" and "why hasn't scramble between 806 and 805 been maintained?" (Tr. 31; Ex. C6).

Faust was working 40 hours a week at Asamera. After being terminated his next employment was seven months later earning \$11 an hour. He claims loss of wages for seven months at \$11 an hour (Tr. 32, 33).

Jerry Lee Moritz testified that he was Faust's partner at the time of this incident. Moritz was also hospitalized (Tr. 34-36). He indicated that it was common practice to blast in the

stope 806. The safety man replied that the condition was caused by the temperature of the outside air (Tr. 36, 37).

Discussion

At the close of the complainant's case respondent moved to dismiss the complaint. After considering the exhibits and the evidence the judge dismissed the complaint. The conclusion reached was that the complainant had failed to offer any evidence that he was engaged in an activity protected by the Act.

Complainant's claim against respondent rests on the proposition that it was common practice to blast while the mine remained in the stope. He followed this practice and, after being injured, he was fired (Tr. 32).

Faust's evidence develops facts that are safety related and there may be some form of discrimination in the operator's actions. But Faust's actions were not an activity protected under the Mine Safety Act. Accordingly, his claim of discrimination should be dismissed.

Conclusions of Law

Upon the record and the factual determinations construed most favorably to complainant, the following conclusions of law are entered:

1. The Commission has jurisdiction to hear and decide this matter.
2. Complainant failed to prove that he was engaged in an activity protected by the Act.
3. Complainant was not discharged for engaging in any activity protected by section 105(c) of the Act.

ORDER

Based on the entire record and the conclusions of law, I enter the following order:

The complaint of discrimination filed herein is dismissed with prejudice.


John J. Morris

Drive, Suite 240, P.O. Box 70250, Reno, NV 89570-0250 (Central
Mail)

/blc

May 6, 1986

GARY GOFF, A.K.A. GARRY GOFF, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 84-86-D
: MSHA Case No. VINC CD 84-
THE YOUGHIOGHENY AND OHIO, :
COAL COMPANY, : Nelms No. 2 Mine
Respondent :

DECISION

Appearances: Frank K. Leyshon, Esq., Leyshon & Leyshon,
Cambridge, Ohio for Complainant;
Gerald P. Duff, Esq., Hanlon, Duff & Paleudis
Co., LPA, St. Clairsville, Ohio for Respondent

Before: Judge Melick

This case is before me on remand by the Commission to determine whether the Complainant, Gary Goff, was discharged by The Youghiogheny and Ohio Coal Company (Y&O) because he was "the subject of medical evaluation and potential transfer" under the regulatory standards set forth in 30 C.F.R. Part 90^{1/} and therefore in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act."^{2/} For the reasons that follow I find that Mr. Goff was not discharged in violation of that section of the Act.

1/ Under Part 90 a miner who has been determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air.

2/ Section 105(c)(1) of the Act provides in part as follows:
No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, . . .
in any coal or other mine . . . because such miner . . .

Nelms No. 2 is an underground mine and with the exception of the surface superintendant all the supervisory employees were required to work underground. Goff was a labor foreman working primarily in the outby areas of the mine away from the face where the coal is actually extracted. He would also be expected to work closer to the face at times filling in for absent section foremen.

Goff testified that on his first day at the Nelms No. 2 Mine he gave Mine Manager Charles Wurscham copies of doctor's notes and x-rays. The reports included physician's statements that he had "borderline pneumoconiosis" and "pneumoconiosis" and brief "Rx" notes that he should not work "underground." Goff also told Wurscham to keep him out of the dust. On the fourth day of his new job, Goff claims his chest was "tight" so he called in sick. Goff visited a doctor that day and later called the mine advising a mine official that he would be off "for 2 weeks or until he recovered."

Apparently because of Goff's reluctance to work underground, the existence of inconclusive and rather summary medical evidence, and past experience with altered doctor's slips, Y&O then set up its own appointment on January 13, 1984, for Goff to be medically examined. According to the exam, including x-ray interpretation by certified "B" Readers, Drs. Terry Elliott and Robert Altmeyer,^{3/} Goff did not have pneumoconiosis. The x-rays were reported as "essentially normal" and of an "essentially healthy chest." Spirometry tests, measuring the breathing capacity of the lungs, pulmonary function tests and arterial blood gas tests were also reported as "normal."

In particular Dr. Terry Elliott stated in reference to the January 13, 1984, examination of Goff as follows:

3/ A "B" reader is a person receiving the highest qualifications to read x-rays for evidence of pneumoconiosis by the National Institute of Occupational Safety and Health.

I find no medical reasons at this time that would prevent Mr. Goff from being able to work underground as a supervisor."

Dr. Altmeyer agreed and said:

"On the basis of the above studies, there is no evidence of any significant respiratory or pulmonary disease, physiologically."

On or about January 14, 1984, Goff mailed a letter and copies of some x-rays to the Federal Mine Safety and Health Administration (MSHA), requesting a determination of eligibility for a "Part 90" transfer. There is no evidence however that Y&O had any knowledge of this application. Meanwhile Goff also wrote a letter to Y&O personnel manager Don Weber on January 16, 1984, in which he asserts that he had a note from his doctor advising that he was "unable to perform the duties" as labor foreman due to pneumoconiosis and that he "should be worked outside the mine do [sic] to the extent of pneumoconiosis shown in the two x-rays" and that "until you have a job for me that is out of the dust I will be off work under doctor's advice."

On January 19 Goff, who had still not returned to work, met with Weber and Wurscham to review the results of the most recent medical exam. Goff was told that based upon the medical reports he would be able to return to work and that if he did not report for work the next day he would be fired. Goff never did return to work as directed and was accordingly discharged effective January 20, 1984.

In order for Mr. Goff to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by the protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2686 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In determining that Y&O was not motivated in any part in discharging Goff by his being "the subject of medical evalua-

had obtained the results of a current and complete medical evaluation of Goff's condition including reports by certified "B" Readers concluding that Goff did not have pneumoconiosis that his lungs were normal and that he could return to work as a labor foreman without restriction. These conclusions were supported by a battery of medical tests including spirometry tests, pulmonary function studies and arterial blood gas tests. Under the circumstances Y&O officials could reasonably have given greater weight to the credible medical evidence that Goff did not have pneumoconiosis. It may reasonably be inferred therefore that the Y&O officials who discharged Goff did so under the belief that indeed he was not then "the subject of medical evaluation and potential transfer" under Part 90 because the best medical evidence then available showed that he in fact did not have pneumoconiosis.

In addition it is contrary to reason and common sense to believe that even had it been known that Goff had applied for Part 90 status, that Y&O would have had any reason to discharge him on that basis. Under Part 90 (30 C.F.R. § 90.101) a qualifying miner is entitled only to transfer to a dust-reduced area where the concentrations of respirable dust are less than 1 milligram per cubic meter of air. The miner is not entitled to transfer if he is already working in an area that meets these standards. In this regard Wurschum believes that the entire Nelms No. 2 Mine complied with the Part 90 requirements. Indeed it is not disputed that in 1984 the average respirable dust concentration in the outby areas of the Nelms No. 2 Mine where Goff would ordinarily be expected to work as a labor foreman, was only 0.55 milligrams per cubic meter. Even in the inby areas of the mine near the faces the respirable dust concentration was less than the 1 milligram per cubic meter requirement.

Thus it is apparent that even had Goff become a Part 90 miner he would not have been entitled to any transfer or change in his work assignment as a labor foreman. Accordingly it is not reasonable to believe that Y&O would have been motivated to discharge Goff for the reasons alleged even had it been known that he would become eligible for Part 90 status. In other words since Part 90 status for Goff would have had no effect on his work assignment there would have been no reason to discharge or discriminate against him.

...he was not subject to medical evaluation and
potential transfer" under the Part 90 regulations. His
complaint of unlawful discharge is accordingly denied and
his proceeding dismissed.



Gary Melick
Administrative Law Judge

Distribution:

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May 6, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

UNITED STATES STEEL MINING
COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 84-49
A. C. No. 36-00970-03537

Maple Creek No. 1 Mine

DECISION

Appearances: Vicki J. Shteir-Dunn, Esq., Office of the
Solicitor, U. S. Department of Labor, Arlington,
Virginia for Petitioner;
Billy M. Tennant, Esq., United States Steel
Corporation, Pittsburgh, Pennsylvania for
Respondent, United States Steel Mining Company,
Inc.

Before: Judge Merlin

On March 28, 1986 the Commission reversed my determination that the operator was negligent and remanded the case to me "for recomputation of an appropriate penalty". Pursuant to the Commission's decision I issued an order dated March 31, 1986 directing the parties to submit their recommendations regarding an appropriate penalty amount on or before April 28, 1986. They have now done so.

I originally assessed a penalty of \$7,500.

The operator recommends a penalty of \$150 on the ground there was no negligence.

The Solicitor recommends a penalty of \$7,500 which represents no change from what I assessed before the Commission overturned my ruling on negligence. In support of a \$7,500 penalty the Solicitor argues that the two

cally address that issue and the operator has not had an opportunity to be heard on it. Even more importantly, the Commission's remand is very specific and limited, i.e., recomputation of an appropriate penalty in light of its decision. I am bound by the terms of the remand as laid down by the Commission. If the Solicitor believes the Commission's view of what it could consider was erroneous or if the Solicitor wants a broader remand, she should have requested reconsideration by the Commission. Presentation of these arguments at this stage constitutes nothing more than an invitation to ignore the terms of the Commission's remand and defy its mandate. This, of course, I cannot and will not do. My views on the merits of this case are set forth in original decision. But the Commission has spoken and it has spoken differently. Whatever significance an issue in a particular case may have, the principle that a trial Judge is bound by the holdings of his appellate tribunal is of transcending importance.

The Solicitor's argues next for a penalty "only slightly lower" than \$7,500 on the basis that even if there was no negligence, the gravity of the violation justifies such an amount. I reject this because it wholly fails to take account of the fact that negligence was a crucial factor in my original assessment of \$7,500. As the record and the decisions at both the trial and Commission levels demonstrate, the issue of the foreman's negligence was the reason the operator sought a hearing. Again, the Solicitor invites me to thwart the Commission's will, an approach I most emphatically reject.

I also reject the operator's recommendation of a \$150 penalty because it does not adequately reflect the other five statutory criteria which must be considered in addition to negligence.

As I originally found, the violation was very serious.

At the hearing the parties stipulated as follows with respect to the other criteria (Tr. 5): (1) imposition of any penalties herein will not affect the operator's ability to continue in business; (2) the violation was abated 1/ in good faith; (3) the operator's history of prior violations is average and (4) the operator's size is large.

1/ The court reporter failed to correctly transcribe "abated

Paul Merlin
Chief Administrative Law Judge

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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 85-105
Petitioner	:	A.C. No. 15-13920-03539
v.	:	
	:	Docket No. KENT 85-141
PYRO MINING COMPANY,	:	A.C. No. 15-13920-03548
Respondent	:	
	:	Docket No. KENT 85-142
	:	A.C. No. 15-13920-03549
	:	
	:	Docket No. KENT 85-159
	:	A.C. No. 15-13920-03550
	:	
	:	Docket No. KENT 85-167
	:	A.C. No. 15-13920-03551
	:	
	:	Docket No. KENT 85-180
	:	A.C. No. 15-13920-03554
	:	
	:	Pyro No. 9 Wheatcroft

DECISIONS

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Bruce Hill, Director of Safety and Training, Pyro Mining Company, Sturgis, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner seeks civil penalty assessments against the responder

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i)
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The primary issues presented are (1) whether the conditions or practices cited by the inspectors constitute violations of the cited mandatory standard, and (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act. Additional issues raised by the parties are disposed of in the course of these decisions.

Stipulations

The parties stipulated that the respondent is subject to the Act, and that at all times relevant to these proceedings the overall coal production for the respondent's operating company was 5,200,080 tons, and that the production for the Pyro No. 9 Wheatcroft Mine was 1,662,825 tons. They also stipulated that the payment of the assessed proposed civil penalties will not adversely affect the respondent's ability to continue in business, and that the violations were abated in good faith.

Discussion

KENT 85-105

Section 104(a) "S&S" Citation No. 2507205, January 29, 1985, 30 C.F.R. § 75.1722: "The north conveyor belt was not guarded on the bottom side where the No. 4 unit supply road passed under the belt. There are exposed moving parts that could be contacted by employees travel (sic) under the conveyor."

equipment would be present. He identified photographic exhibit R-1 as a photograph of the belt location in question and confirmed that the photograph shows the guarding which was installed to achieve abatement. He believed that miners congregated at the location in question, and he stated that there was a mine phone nearby, but that it was not in the area of the unguarded belt.

David Furgerson, mine safety manager, testified that the belt was initially installed approximately 13 to 14 months prior to the citation and that many MSHA inspectors had passed under it without citing it. Mr. Furgerson did not believe that anyone passing under the belt could contact the idlers, but conceded that if they stood up while in a piece of equipment they could contact it. He saw no evidence of any prior guards, and did not believe that anyone would be injured if the belt broke.

Section foreman James M. Hibbs testified that he is familiar with the unguarded belt in question, and he stated that for the 3 years he has been employed at the mine he has never known the belt to be guarded.

Inspector Newlin confirmed that he issued a citation for coal accumulations (2507206) on the Number 5, 6, and 7 return entries. He described the accumulations as "grey and black in color," ranging in depths from 0 to 8 inches, 20 feet wide, along the crosscuts and entries. He believed that the accumulations resulted because of a failure to properly clean up while the mining cycle advanced, and he indicated that the accumulations were the result of mining as the faces were advanced. The entries in question were in neutral belt return entries where no active mining activities were taking place.

Mr. Newlin stated that the accumulations presented a hazard in that they could have contributed to the enhancement of an explosion. In the event of any ignition of explosion at the face, the accumulations would have contributed to the severity of the explosion. He saw no evidence of any equipment passing through the areas in question, and confirmed that no immediate ignition sources were present. He confirmed that the closest mining taking place was approximately two

On cross-examination, Mr. Newlin stated that he had intended to take a dust survey, but after observing the accumulations and issuing the citation, he did not take such a survey. He detected a negligible amount of methane present in the cited locations, and while the area was not adequately rock-dusted, he confirmed that he issued no citation for lack of rock dust. He stated that the coal accumulations were behind the section brattice line, and that no ignition sources were present behind the brattice line. He believed that equipment could have traveled the area, and confirmed that the brattices had been previously constructed.

Safety manager David Furgerson, confirmed that he traveled with Mr. Newlin during his inspection and he confirmed the existence of the cited coal accumulations. He produced a copy of the preshift examiner's report for January 30, 1985 and noted that no violations or hazardous conditions were noted (exhibit R-3).

Inspector Newlin confirmed that he issued the permissibility violation (2507208), for the loader used to load coal in the number 3 unit after finding a loose packing gland and loose wire which had been cut on the machine. The wire was for one of the headlights, and while it was disconnected, the end was not insulated where it had been cut. The loader was in operation loading coal, and he detected .2 methane present but this caused him no particular concern. Mr. Newlin stated that the loader operator told him that "there was power to the wire." Mr. Newlin stated that the loose energized wire could come in contact with the frame of the loader and cause a spark. The loader operator advised him that the light had come off the machine, but that the face boss was not aware of the condition.

Mr. Newlin stated that he cited two separate conditions: the loose uninsulated wire, and a loose packing gland. He identified a similar packing gland produced by the responder for demonstration purposes, and he confirmed that it was loose by turning it with his fingers and finding that it was not "finger tight." The purpose of the packing gland is to keep the wires inside the machine protected from arcs or sparks. Mr. Newlin confirmed that he issued a second citation on that same loader (No. 2507209) that same day because the methane monitor sensor head was clogged with dirt and oil.

notes did not reflect any statement by the operator. The wire was energized. Mr. Newlin confirmed that he did not check the loader light fuses to determine if they had blown out, and he stated that he would not have issued the citation if there was no power to the light wire in question. The wire appeared to have been cut, and the exposed end had not been insulated. Mr. Newlin also confirmed that he did not check the loader electrical junction box and did not check the wire with an OHM meter.

Safety manager David Furgerson testified that the wire could have been cut when it came into contact with a rib. He stated that the machine operator would not know whether there was power to the wire after it was cut. He recalled no conversations with Mr. Newlin or anyone else about the cited condition, and he did not know the identity of the loader operator.

James Crowell, respondent's maintenance director, testified that the loader has two sets of lights, and that they operate under two separate electrical circuits. He stated that the loader can operate with one light, and that in the event a wire or cable is cut, the fuse would blow and interrupt the power to the light. He confirmed that he did not examine the loader in question, and conceded that a fuse does not always blow if the light wire or cable is cut.

Inspector Newlin confirmed that he cited the loader on the number 3 unit after finding that the methane monitor sensor head was gobbled with oil and dirt (2507209). He explained that the purpose of the sensor head is to detect the presence of methane. If methane is detected, the sensor sends a signal to the methane monitor which registers the amount on a signal device in the operator's cab. In his opinion, the gobbled sensor head would prevent the proper signal, but he conceded that he did not test the sensor with a predetermined mixture of methane to be absolutely sure that it was not functioning properly because there was not enough methane present to make comparisons, and he had not used predetermined mixtures with him at the time he observed the condition. However, based on his visual observation of the gobbled condition, he did not believe that the sensor head was functional.

the sensor cap was removed. He also confirmed that the gobbled condition was readily observable, that there was sufficient air ventilation on the unit, and that it was adequately rock dusted. He also confirmed that there were no dangerous methane accumulations present.

Safety manager David Furgerson testified that it was his belief that the methane monitor sensor head was working properly even though it was gobbled with dirt and oil. He stated that the specific gravity of methane is .5545, and that it will permeate oil and dirt because it is porous material. He confirmed that the maintenance department cleaned out the sensor head, but that it was not tested with a known mixture of methane. It was his view that simply because the sensor head was dirty did not indicate that it was inoperable. He simply did not believe that the oil and dirt was "packed in enough" to prevent the sensor head from sending a signal to the methane monitor.

KENT 85-141

Section 104(a) "S&S" Citation No. 2508624, April 11, 1985, 30 C.F.R. § 75.807:

The high voltage cable installed along the north west track entry was not placed so as to afford protection against damage from mobile equipment in several places. Also the cable was not guarded in at least fifteen places where miners were required to be under it. Supplies and tool boxes were stored under the cable.

Section 104(a) "S&S" Citation No. 2508625, April 11, 1985, 30 C.F.R. § 75.1306: "The explosives magazine on the No. 4 unit, I.D. No. 004 was not maintained in good condition because the doors would not close, the magazine had been struck by a piece of machinery."

Section 104(a) "S&S" Citation No. 2508627, April 11, 1985, 30 C.F.R. § 75.400: "Accumulations of loose coal and coal dust, 2 to 6 inches deep and averaging 8 foot wide was present along the ribs of the No. 4 unit belt beginning at the tailpiece and extending outby 150 feet."

Section 104(a) "S&S" Citation No. 2507618, April 23, 1985, 30 C.F.R. § 75.807: "The 7200 (volts) high voltage cable strung across the No. 3 entry used as the haulage road did not have a guard on it. The entry was approximately 4 feet high. Miners were required to travel under this cable."

MSHA Inspector James E. Franks testified as to his background and experience. He confirmed that he inspected the mine on April 11, 1985, and issued Citation No. 2508624, after observing several locations, and at least 15 additional locations along the track entry in question, where a high voltage cable had not been hung or guarded to prevent damage from equipment or from miners coming in contact with it. He stated that supplies were stored under the cable at the locations in question, and in several places the cable was hung so low that he believed it could be damaged by equipment was required to pass under it while storing and retrieving supplies. Mr. Franks stated that section 75.807, requires cable protection to protect the cable from equipment damage and to also protect miners from coming in contact with it. He confirmed that he issued the citation to prevent cable damage from mobile equipment at several places, and to prevent miners from contacting the cable when they passed under it at the locations where the supplies were stored. He explained that any cable located at points where men do not regularly pass under it is required to be guarded by hanging it out of the way of equipment or behind timbers, and that at places across roadway and travelways, it is required to be guarded or covered to preclude miner contact as well as equipment damage.

Mr. Franks identified a piece of PCV hard plastic pipe produced for demonstration purposes at the hearing as the type of guarding which is acceptable to MSHA. The pipe material is cut along one side so as to facilitate it being tied or otherwise secured around the cable for protection. He stated that the PCV pipe is similar to the guarding used by the respondent.

Mr. Franks testified that in at least five or six locations the cable was lying along the side of the track on

or equipment would damage the cable. Most of the other 15 locations were at the end of the track where the respondent stored blocks, boards, steel ties, and roof bolts, and he believed that men were required to pass under the cable to move the supplies in and out, and the chances were great that someone would come in contact with the unprotected cable.

Mr. Franks conceded that the cable in question is inherently shielded and that it was provided with a ground check monitoring system. A properly functioning system will deenergize the cable if it is cut or shorted out, but he believed that such a system may not always be in proper working order. He also believed that it was possible that someone merely touching the cable would not suffer any harm, but on the other hand, if the conditions were right, it could cause fatal injuries. He confirmed that the cable at the equipment supply locations was hung but not protected, and at the other locations it was simply lying on the mine floor.

On cross-examination, Mr. Franks stated that the section in question was operating on a 20-hour a day production schedule, and that the supplies which were stored under the cited cable locations were needed and used during these production periods. He confirmed that as the mining cycle advances, the supplies would be moved up. However, he pointed out that the track entry had been driven approximately 1,200 feet and that the track had been in place for about a year. He believed the supplies in question had been stored at the cited locations for approximately 3 weeks, and that men were regularly required to pass under the unprotected cable to retrieve and move the supplies. He observed miners under the cable, and also observed a motor unloading supplies under the cable. He confirmed that he did not know the type of cable used by the respondent and that he detected no damage to the cable at any of the cited locations.

Mr. Franks discussed the supply and storage system used at the mine, and he explained MSHA's guidelines for guarding high voltage cables. He confirmed that the type of plastic PCV pipe used by the respondent to guard its cables is acceptable as adequate guarding material for high voltage cables.

James Crowell, respondent's maintenance director, testified that he has 15 years of experience in electronics and

mately two times the diameter of the standard cable, and it has an insulated jacket and three electrical conductors which are independently braided and protected by insulation. The cable has two insulated ground wires and one insulated ground check wire, and he described it as "the best available cable on the market." He stated that in the unlikely event that the cable were run over and a massive break or cut occurred to the insulated high voltage conductor, the cable would deenergize and the power would cut off. He is unaware of any incidents in which the cable has failed to function properly.

On cross-examination, Mr. Crowell confirmed that he did not inspect the cable which was cited by Inspector Franks, and he stated that the cable ground monitoring system is required to be tested and checked monthly. He believed that under normal mine operating conditions the cable in question is inherently safe, and that it was not reasonably likely that someone would be injured by contacting such a cable.

Inspector Franks confirmed that he issued Citation M 2508625 on April 11, 1985, after observing that the doors of a mobile explosives magazine would not shut tight to afford protection to the explosives stored inside. The doors appeared to have been struck by another piece of equipment, and he observed an indentation in the doors. The doors were warped and they could not be shut tight to the latches provided to secure the doors. He believed that the magazine could be moved and advanced as the mining cycle advanced, and was concerned that another piece of equipment could run into it while it was being moved. With the doors opened and unsecured, he believed that such a collision would detonate the explosives stored inside the magazine.

Mr. Franks stated that the magazine, in its parked position at the time of the inspection, was not in the line of fire of any shots that may have been fired. However, he believed that it was possible for a piece of shot coal or rock to fly into the area where the doors were not secured. The magazine were moved to an area where shots were being fired, and that the explosives could possibly be detonated. If this occurred, 14 people on the section would be exposed.

Mr. Franks could not state how long the condition of the doors had existed. Apart from the warped doors, he confirmed that the magazine was otherwise properly constructed of metal with adequate insulation inside. He did not know the type of powder stored inside the magazine, and made no determination whether or not any detonator caps were also stored in the magazine with the powder. If they were, he speculated that they would be stored and isolated from the powder by a metal compartment.

On cross-examination, Mr. Franks identified two photographs of a mobile explosives magazine taken by the respondent, and he confirmed that it was similar to the one he cited. The magazine is mounted on rubber tired wheels and explained that when it is moved it moves along a track with the wheels lowered. When it is parked, the wheels are raised to the position shown in the photographs. He identified the doors on the side of the magazine depicted in the photographs as similar to the ones he cited, and he confirmed that the overall metal construction and configuration of the magazine was similar to the one cited.

Mr. Franks stated that under normal operating conditions the powder and detonators are stored separately inside the magazine and they are separated by a 4 inch metal or steel plate, and that apart from the doors, the cited magazine was of substantial construction and was otherwise in compliance with the requirements of section 75.1306.

In response to a suggestion by the respondent's representative that the respondent complied with the requirements of section 75.1304, because it always kept its explosives or detonators in properly constructed closed containers, Mr. Franks stated that section 75.1304 does not apply to the facts on which he based his citation. He explained that section 75.1304, is intended to apply where explosives and detonators are "hand carried" by the shooter to the shot location after he has taken them out of the magazine. He explained further that the cited mobile magazine is not "carried" by miners, but is moved or pulled about the mine on a track by means of another piece of equipment and a cable or other coupling device. He emphasized the fact that he cited the violation because the damaged and warped doors rendered the magazine less than "of substantial construction" as required.

that it would be struck by other equipment travelling a the unit, with resulting injuries of a serious nature.

James Hibbs, respondent's safety manager, confirmed the doors of the explosives magazined cited by Mr. Fran were damaged. He stated that one of the doors was "bad damaged" and that the other one was "not quite as bad." confirmed that it was impossible to securely close or l the doors. He confirmed that when the magazine is move wheels are down, and that in this position, it is impos to move the magazine with the doors opened because they strike the wheels.

On cross-examination, Mr. Hibbs stated that he had knowledge as to how the cited magazine was moved out of mine to achieve abatement. He confirmed that the respo uses a water based gel explosive powder manufactured by Dupont, and it is known as "Tovex." He confirmed that explosives used in the mine are permissible, and that i order to have an explosion, a detonator device must be in conjunction with the powder. He did not believe tha powder, by itself, will explode by being struck by equi or rocks.

Inspector Franks confirmed that he issued Citation 2508627, on April 11, 1985, after observing accumulations of loose coal and coal dust along the ribs of the No. 4 un belt line for a distance of approximately 150 feet. He described the conditions he observed, and he stated tha active mining on the unit was taking place two to three cuts inby the areas where he observed the accumulations

Mr. Franks speculated that the accumulations had e for 4 to 6 days, and he surmized that they either rolle shuttle cars which had traveled the area or had been le there as the unit advanced. He observed some of the co accumulations along two of the bottom belt rollers whic turning in the coal, and a power cable was on the coal. confirmed that waterlines and fire warning devices were installed along the belt line. Although his visual obs tions led him to conclude that the area in question was

belt rollers could cause a fire, and the presence of a belt roller which he observed constituted a possible ignition source.

On cross-examination, Mr. Franks confirmed that the normal mining procedure in the mine is to advance one break during production, and that the respondent's normal practice is to "scoop the entry" before installing the belt line. He conceded that the accumulations could have existed for more than 4 to 6 days.

MSHA Inspector Dennis Dati confirmed that he issued Citation No. 2507611 on April 12, 1985, after observing accumulations of float coal and coal dust across the No. 3-A belt conveyor entry for approximately five crosscuts, or a distance of 100 feet. He stated that the accumulations varied in size, and that in some areas he could see the rock dust under the accumulations. He confirmed that the belt was moving, but observed none of the accumulations turning in the belt rollers. The electrical power box which provided power for the belt, as well as the timbers and the belt itself, were in the area of the accumulations. He could not determine how long the accumulations had existed prior to his inspection, and he discussed the conditions with respondent's safety manager David Furgerson, but he made no comments.

On cross-examination, Mr. Dati stated that float coal and coal dust is explosive, and "if it goes off" it is extremely hazardous." He did not return to the mine until April 15, because he had other business to attend to, but when he returned he found the conditions abated and the area had been cleaned up and rock-dusted. He confirmed that he did not sample the accumulations for incombustible content, but based on his observations, he believed that any sample taken would have indicated 65 percent incombustibility. He stated that the float coal dust was scattered throughout the cited area and was present on the belt and box. He could not determine whether the areas were wet, but he conceded that under normal operating conditions the belt heads would be wet. He conceded that the cited area was adequately rock-dusted.

Respondent's safety manager David Furgerson testified that he was with Inspector Dati during his inspection, and he confirmed the existence of the cited accumulations. He

taken in on the belt and the area had to be hand dusted. cited areas looked white to him, and he believed the cited accumulations had existed for possibly one prior shift or most 2 days.

Inspector Dati confirmed that he issued Citation No. 2507618, on April 23, 1985, after observing an unpro high voltage cable hung across the No. 3 entry haulage road. He stated that he was with respondent's safety manager James Hibbs in a golf cart driving towards the face area, and they passed under the cable. The cable was not guarded in the area where it crossed the roadway, and he believed that 10 men would regularly be required to travel under the cable.

On cross-examination, Mr. Dati stated that the haulage road in question was the main haulage road used by scoops, jeeps, and men on foot. The cable was hung on J-hooks but was not guarded by the pvc plastic pipe material normally used by the respondent for this purpose. He observed haulage equipment travelling the roadway, and he confirmed that it was possible that the guarding had been knocked off. He observed no damage to the cable, and confirmed that he saw the guard lying by the side of the crosscut. The condition was abated within an hour or so.

Safety manager James Hibbs confirmed that he was with Inspector Dati when he issued the citation. He stated that he could see the cable from a distance as they approached in the golf cart, and since a curtain was hung across the road, he could not see that the cable guard was off. He believed the guard had recently been knocked off, and he observed that the tape used for installing the guard to the cable was still present on the cable. He stated that the unit was driving to the left off the main entry, and that the day in question was the first production morning on the road. He had no reason to believe that it was necessary for anyone to go under the cable before the unit was advanced.

On cross-examination, Mr. Hibbs conceded that men and equipment regularly used the haul road in question, and they would pass under the cable. He believed that the cable had not been unguarded for more than 8 hours, and he did not know how many men were on the unit.

Section 104(a) "S&S" Citation No. 2507619, April 26, 1985, 30 C.F.R. § 75.807: "The 7200 high voltage cable strung across the crosscut at spad No. 12+80 between No. 3 and No. 2 entrys' (sic) were (sic) there was evidence of miners travelling under it did not have a guard on it."

MSHA Inspector Dennis Dati testified as to his background and experience and he confirmed that he issued the citation in question. He confirmed that Mr. James Hibbs, respondent's safety representative, accompanied him during his inspection. Mr. Dati stated that he and Mr. Hibbs were travelling the entry roadway in a golf cart and when they reached the crosscut at spad 12+80, Mr. Dati observed that the high voltage cable which was hung across the crosscut was not provided with a guard. Cables hung at such locations are normally guarded by a plastic "water-pipe" type shielding which is taped over the cable portion which crosses the crosscut.

Mr. Dati stated that he observed no one walking or driving under the cable, but he did observe "all kinds" of tire tracks under the cable and this led him to believe that equipment had passed under it. However, he observed no foot prints, and the tire tracks were over the rockdusted crosscut roadway. Mr. Dati estimated that the cable was hung up approximately 4-1/2 to 5 off the floor, and he stated that it is 5 feet 8 inches tall and could not stand up in the area.

Mr. Dati stated that the hazard presented was the possibility of equipment running into the cable and damaging it. He could not identify the types of equipment which may have made the tracks, but he assumed they were made by scoops, track buggies, jeeps, or golf carts. The cable had an outer protective insulated jacket, but it was not otherwise protected against damage. He did not believe that a person contacting the cable could be injured, and his only concern was over possible damage to the cable through equipment contact.

On cross-examination, Mr. Dati reiterated that the only evidence he had to support his conclusion that men or equipment regularly passed under the cable were the tracks he

was taking place. Referring to exhibit K-6, a sketch area, Mr. Dati placed the cable location in question imately five crosscuts outby the face, and he agreed power center was advanced approximately three crossc mining cycle advanced. The cable was hung along the side of the roadway for four additional crosscuts ou location where it was not guarded. These additional were timbered, and since the cable was behind the ti was not required to be guarded at those locations.

Mr. Dati confirmed that the unguarded cable was with a ground check monitoring system which is inten cut off the power in the event the cable is damaged.

In response to further questions, Mr. Dati stat he observed no damage to the cable, and observed no abrasions, or other evidence of cable damage. He al firmed that he did not interview any of the equipmen tors who may have passed under the cable, did not as the types of equipment operating on the section, and not know the heights or other working parameters of ment. He believed that the only person exposed to a would be the individual who passed under the cable. event of cable damage, that person would be exposed sible hazard from any cable damage.

Mr. Dati stated that Mr. Hibbs offered no expla for the condition in question and simply agreed that cable needed to be guarded. A guard was installed w 20 minutes, and Mr. Dati terminated the citation.

Mr. Dati identified a copy of an MSHA report of gation concerning a fatality which occurred at anoth because of a defective low voltage cable monitoring and he conceded that the citation in issue in this c with a high voltage cable which was not damaged.

Section foreman James Hibbs confirmed that he a Inspector Dati during his inspection, agreed that th was not guarded with any additional guarding other t own protective insulated cable jacket, and agreed th hung across the crosscut at the spad 12+80 location. no equipment or miners passing under the cable and h

damage to any of the high voltage cables.

Mr. Hibbs stated that all of the mine high voltage cables are hung on insulated hooks and that in areas where men or equipment regularly pass under the cables they are protected and guarded by a hard plastic type guarding device which is taped over the cable at those locations.

On cross-examination, Mr. Hibbs testified that the unit was engaged in retreat mining and that mining was taking place in the rooms to the right of the haulageway where the cable was hung. He marked exhibit R-6 to show where the rooms were located and he explained what was taking place and how the cable in question was routed to the power center. He placed the location of the power center in an area to the right of the roadway as shown on exhibit R-6, and he confirmed that a guard was installed within 20 minutes in order to abate the violation.

KENT 85-167

Section 104(d)(1) Order No. 2507503, March 21, 1985, 30 C.F.R. § 75.313: "The methane monitor on the No. 2 unit loader had been bridged out in the power box. Coal was being loaded in the No. 2 heading."

MSHA Inspector George Newlin confirmed that he conducted an inspection at the mine on March 21, 1985, and issued the citation after finding that the loading machine methane monitor was inoperative. He tested the monitor by activating the test button, and when it did not deenergize the machine an electrical mechanic was called to the scene. He discovered that the monitor had been "bridged out" and that a wire was disconnected. He reconnected the wire and this rendered the monitor operable.

Mr. Newlin stated that during an inspection the day before the citation was issued he observed the same loader with the same inoperative methane monitor. The machine was idle, but the power was on. The maintenance foreman did some troubleshooting and after removing some cover bolts, found that the monitor had been "bridged out." He repaired it and rendered it operable. Mr. Newlin stated that he did not issue a citation that day because the machine was idle and he was told that the monitor was scheduled for maintenance that

Mr. Newlin stated that at the time he cited the loader on March 21, it was loading coal and the regular production crew was working. He believed that a methane explosion could occur at any time underground and that a serviceable monitor is critical in order to deenergize the loader when explosion levels of methane are detected.

On cross-examination, Mr. Newlin confirmed that the citation was abated within 22 minutes after the monitor bridge was removed. At that time, the monitor was "partially working," and he was told that a new one was on its way underground to replace the questionable one. Although the old one was not completely operable, he permitted the loader to be used, but only after instructing the operator to use a methane spotter for periodic methane checks. He confirmed that methane monitors which have mechanical problems "may be repaired one minute and then go out the next."

Mr. Newlin confirmed that he found no unusual amount of methane present during his inspections and issued no additional citations for any hazardous ignition sources. He corrected his prior testimony and stated that he did issue 104(a) citation on March 20, because of the inoperable methane monitor in question. He stated that he did not know who bridged the monitor or why it was done. He explained that such monitors often experience mechanical problems and speculated that it may have been bridged out to prevent the machine from deenergizing while it was in operation and loading coal. He reiterated that he permitted the machine to be used with a partially repaired monitor because he knew a new replacement was on its way and would be installed, and that a spotter would be used. However, he did not remain on the scene until the new monitor was actually installed.

Douglas Whitley, mine foreman, confirmed that he was with Inspector Newlin when he cited the methane monitor in question, and confirmed that it had been bridged out and was inoperative. He also confirmed that he made his methane checks and that Mr. Newlin permitted the partially repaired monitor to be used on March 21, until the new one was installed. He confirmed that Mr. Newlin did not state that it could be used while it was bridged out, and he had no

with Inspector Newlin on March 20, when the methane monitor condition was first discovered. He stated that the third shift was performing routine maintenance and discovered that the monitor in question had been bridged out. The monitor was repaired at that time, but he had no personal knowledge as to the extent of the repairs or what was done to render it serviceable.

James Crowell, maintenance director, testified that methane monitors regularly break down for various mechanical reasons and he produced a maintenance and order form indicating that a new monitor was ordered for the one which was defective (exhibit R-3).

KENT 85-180

Section 104(a) "S&S" Citation No. 2507175, March 11, 1985, 30 C.F.R. § 75.1300: "Care was not taken to be sure that all personal (sic) was (sic) clear of a shot that was fired in the crosscut between No. 3 and No. 4 entry on No. 1 unit."

The citation was modified on March 28, 1985, as follows:

Citation No. 2507175 is hereby modified to change the Part/Section from 75.1300 to 75.1303 and to include in the body of the citation that permissible explosives were not being used in a permissible manor (sic) in that care was not taken to ascertain that all persons were in the clear, and the loader operator was not removed from the adjoining working place (No. 3 entry) where there was a danger of shot blowing through.

Section 104(a) "S&S" Citation No. 2507176, March 11, 1985, 30 C.F.R. § 75.1300: "An unintentional unconfined shot was fired in the crosscut between No. 3 and No. 4 entry on No. 1 unit ID 001."

MSHA Inspector Ronald Oglesby testified as to his background and experience, and he confirmed that he and another inspector conducted an investigation of an explosion which occurred at the mine at approximately 1:00 a.m., on March 11,

exhibit P-8 as a diagram of the mine section given to someone in the respondent's safety department. Mr. O described the "explosion" as a "large blow out" from of a crosscut at a location where a drill hole had be through. As a result of his investigation, including examination of the drill hole, he concluded that an u shot had taken place.

Mr. Oglesby confirmed that he issued Citation No. 2507175, because the shooter failed to take care insure that all miners in the blast area were clear o shot and removed from the area. He stated that he pl location of loader operator Marvin Ferguson, who was by the blast, by speaking with the shooter and other during his investigation. He also spoke with Mr. Fer March 27, while he was in the hospital recuperating f he received by the blast, and Mr. Ferguson told him t was temporarily operating a loader in the number 3 en awaiting the arrival of the regular loader operator. Mr. Ferguson confirmed that the shooter, James Bealme him that he was preparing to fire a shot and asked if clear. Mr. Ferguson stated that he told Mr. Bealmear was in the clear, and then proceeded to squat down wi hands over his ears when the shot went off. After th Mr. Ferguson shouted to Mr. Bealmear, but Mr. Bealmea not get to him, and the face boss came to Mr. Ferguso rescue.

Mr. Oglesby referred to the sketch and testified after Mr. Bealmear loaded the shot hole, he returned location shown on the sketch and fired off the shot.

Mr. Oglesby confirmed that he issued Citation No after determining that the shot in question was an un shot. He defined an "unconfined shot" as one which i without at least 18 inches of overburden material aro He did not know the type of explosive used by the sho could he determine whether any stemming was used. Th ance of the blown-out area indicated to him that the not confined, and he stated that had it been properly it would not have blown out. He identified exhibit P the results of a state investigation of the incident.

and that the existence of such uneven crosscuts is not uncommon. He also confirmed that it is not illegal to make "pop shots" by shooting one drill hole at a time.

Mr. Oglesby testified as to the distinctions between a confined and unconfined shot, and he stated that he could not recall seeing through to the number 4 entry from the number 3 entry. He identified exhibit P-10 as a statement made by Mr. Ferguson on June 3, 1985, and confirmed that his accident investigation report stated that Mr. Ferguson was not in the direct line of fire of the shot. He also confirmed that he issued no citations for the lack of proper shot stemming or for the use of non-permissible shot powder.

In response to further questions, Mr. Oglesby stated that he observed that the coal behind the shot had been fractured, and he further explained why he believed the shot was unconfined and how the fractured coal indicated to him that the shot could not be contained. He confirmed that Mr. Ferguson's injuries were not the direct result of being struck by the shot material, but that he suffered burns as the result of dust or methane being ignited by the shot. He also confirmed that had Mr. Ferguson been removed completely out of the entry and area where he was working at the time of the shot, the citations would not have been issued.

James S. Bealmear testified that he worked for over 11 years for the Island Creek Coal Company, and has worked for the respondent for the past 2 years. He stated that he is a certified mine foreman by the State of Kentucky, and that this certification qualifies him as a shot firer. He confirmed that he fired the shot in question between the number 3 and 4 entries, and he stated that he loaded the drill hole properly with two stemming devices and powder. After loading the powder he pulled the charge back with a wire device to insure that it had not fallen through the drill hole on the other side. He then stemmed the hole and had he had any doubts that the charge had dropped or fallen through the hole, he would have checked it. He confirmed that all of the other drill holes were shot through except for the one which blew out.

Mr. Bealmear stated that after loading the shot he ordered a cutter man who was working the number 5 entry to

On cross-examination, Mr. Bealmear reiterated that a warning Mr. Ferguson about the impending shot, Mr. Ferguson told him to "go ahead, I'm o.k.". Mr. Bealmear explained that the area marked "C" on the sketch was solid coal, and that the "A" area had been shot. Since the drill holes in the area which had been shot were collapsed, he could not see the shot from that side. He confirmed that he was familiar with the permissibility shot firing regulatory requirements and procedures, and indicated that the shot itself blew out the coal and not the coal. He confirmed that he did not know the depth of the coal at the point where the hole was loaded, and that he had no reason to believe that the shot would blow out. Although the face boss was aware that he was shooting, he did not speak to the face boss before firing off the shot because the boss is not expected to be in the area at all times.

Mr. Bealmear stated that he averages approximately 40 shots a day, and based on his experience as a shooter he did not believe that there was a danger of the shot in question blowing out at the time he set it off. He stated that the drill hole had been shot half-way through on one side, and that he loaded it from the other side to complete the shot.

Marvin H. Ferguson testified that he has 11 years of mining experience and that he is currently employed by the Isom Creek Coal Company. He confirmed that he was previously employed by the respondent as a mechanic, and that on the morning of the accident he was temporarily asked to operate a loader in the absence of the regular loader operator. He stated that he had loaded out two or three cars of coal, but stopped loading because additional cars had stopped coming into the area. He confirmed that he had parked his loader and was not loading at the time of the ignition in question.

Mr. Ferguson stated that he was aware of the fact that Mr. Bealmear was going to fire a shot because he observed him at the No. 3 entry and Mr. Bealmear warned him that he was going to fire a shot. Mr. Ferguson stated that he told Mr. Bealmear that he "was o.k.," and that after the initial warning he proceeded to walk out of the entry and stopped on the right side of the rib where he stooped down to await the shot. He marked the spot where he was located when the shot

with him in the hospital. He recalled speaking with someone about the incident, and he explained that he was being treated for burns, had undergone skin grafts, and was medicated during the 3 weeks that he spent in the hospital and could not remember who the individual was. Mr. Ferguson stated further that Mr. Bealmear had previously fired shots in the mine and that on every occasion that he could recall Mr. Bealmear always called out three warnings before firing a shot. Mr. Ferguson also confirmed that during his employment with the respondent he was always retrained annually in his job tasks.

Docket No. KENT 85-159

Section 104(a) "S&S" Citation No. 2507418, issued on March 18, 1985, cites a violation of 30 C.F.R. § 75.1403-5(g), and the cited condition or practice states as follows: "A clear travelway was not provided on the 3A belt for 50 feet starting 6 crosscuts inby the 3A header."

The citation was modified on March 20, 1985, as follows:

Citation No. 2507418 issued for a clear travelway on the 3A belt for a distance of 50 feet, starting 6 crosscuts inby the 3A header is modified to not require a travelway in this area. This is due to adverse roof conditions. This area has had a rock fall, cribs have been installed and the top is too bad to remove the cribs. However, the following stipulations will be followed: Stop and start switches shall be installed both inby and outby the area; signs both inby and outby the area; the belt will be stopped before being examined; if any violations of Part 30 C.F.R. are observed, the belt will remain down until corrections are made.

Section 104(a) "S&S" Citation No. 2507612, issued on April 16, 1985, cites a violation of 30 C.F.R. § 400, and the cited condition or practice is stated as follows: "Accumulations of float coal dust and coal dust was observed over previous rockdusted surfaces in the No. 4 unit belt conveyor

observing that a clear travelway was not provided on the belt for 150 feet starting six crosscuts in by the 3-A he. The area had been "cribbed out," and there was no way for a belt walker to examine the belt or to do any cleaning or maintenance work on the belt because there was no 24-inch clearance on either side of the belt. Once a citation is issued for such a condition, his supervisor has to go to the mine to examine the area and inform the operator as to what is required for compliance (Tr. 742-743).

Mr. Newlin stated that in issuing the citation, he was on a previously issued safeguard notice of February 26, (exhibit P-22). The previous safeguard was issued for a location where there was no 24-inch clearance on the belt.

Inspector Newlin explained the effect of a previously issued safeguard notice as follows (Tr. 779-781):

A. Under these conditions in that area. But what I was wanting to say is, if I find another condition at this same mine, without a travelway, even if they have gone by these rules, in another area, I would still issue a citation.

JUDGE KOUTRAS: Why would you do that?

A. Because these areas are something that was set out; I mean, these stipulations were set out for this location. And the next location, whoever the man was that was making this judgment might make a different judgment for that location. This doesn't give them a -- My original Safeguard tells them they've got to have 24 inches throughout the mine.

JUDGE KOUTRAS: You mean to tell me that when the initial Safeguard Notice is issued because a mine operator didn't maintain 24 inches because of rib clearances, you give them 24, and you give them the alternative means of complying, the start and stop switches--

A. At that one time.

line, do you mean to tell me that he's not authorized to go ahead and put stop and start switches in?

A. No, sir.

JUDGE KOUTRAS: To comply with the previous Safeguard Notice?

A. No, sir.

JUDGE KOUTRAS: But he has to have authorization from MSHA to do that before he does it?

A. As far as a Safeguard Notice.

Inspector Franks was called by MSHA to further clarify the safeguard procedure, and he explained it as follows (T 782-784):

A. If you go to a mine, and you find the conveyor belt where they don't have the 24-inch clearance, you issue a Safeguard, providing there's never been a Safeguard issued. We issue a Safeguard requiring them to provide the clearance.

The company will submit a letter or something to the district manager. The district manager, he's doing it, so I assume he has this authority to delegate it to somebody lower down, like a supervisor.

Then this supervisor will go to this mine, and he'll look at it. And the operator says, "Boy, I've got bad top. Here, I've got water comin' in here. I just can't provide the travelway."

Somebody has to make a decision, either an inspector or supervisor looking at, too, if nobody is pulling his leg, in other words. And he'll decide, okay, you can not provide the clear travelway. But I'm going to make

already been a safeguard and I find another condition, they don't provide the 24 inches of clearance. I issue a citation because there can't be but one Safeguard on that particular belt. I refer back to that Safeguard.

JUDGE KOUTRAS: Why would you issue the citation?

THE WITNESS: Because that's the instructions.

JUDGE KOUTRAS: Because there wasn't any clearance on either side?

A. Yes. I refer back to that Safeguard, and I write this citation. I don't have the authority to tell him, "You can go ahead and violate the law." So I issue a citation. The operator screams bloody murder. "I can not provide the clearance." So we'll go through the same procedure again. He'll write a letter to him. Somebody in higher authority will come out and look at it to make the determination.

On cross-examination, Mr. Newlin confirmed that he the citation for lack of a 24-inch clearance on the line caused by the installation of roof cribs which were in because of the roof conditions. He confirmed that in question was not a primary or secondary escapeway, prior to the installation of the cribs there was no problem with the belt. He confirmed that he had previously installed the belt a week before on either March 14, or 15, but that he required the respondent to crib out the belt for a distance of 60 feet on both sides from rib to rib. He testified that "maybe I asked them to timber up the belt," and confirmed that when he came back on March 18, he issued the citation and also issued another one for loose coal accumulation at the end of the fall to the header (Tr. 795-799).

Safety manager David Furgerson confirmed that the citation was issued because the timber and cribs on the belt

should," the cribs are taken down, and the belt is put back in. Once this is done, if the roof conditions are adverse, additional cribbing and timbers are installed, and the respondent must then apply for a waiver (Tr. 800).

Mr. Furgerson stated that the area in question had already been cribbed, and that when Mr. Newlin first observed it he suggested that additional timbers be installed because the area where the belt walkers were expected to travel "was busted up." The additional timbering was done on either March 16 or 17, and when Mr. Newlin returned on March 18, he issued the citation for lack of clearance on the belt. Mr. Furgerson explained further as follows (Tr. 801-802):

* * * And I asked him about the citation, which I really didn't have any trouble with him writing because if he hadn't wrote the citation, then we would apply for a waiver and another MSHA representative would have come down and written the citation. We was going to get the citation one way or the other. Once we set the additional timbers in there, whether a regular inspector finds it or whether we find it and ask for a waiver, which we have to do by law, we're going to get the citation one way or the other. So I didn't have no big problem with him that day with him writin' it.

Mr. Furgerson explained that in situations where the respondent cannot maintain 24-inch clearances on its belt lines because of the installation of cribs due to adverse roof conditions, it submits a letter to MSHA's district office for a "waiver," and the request is normally accompanied with a mine map designating the affected area. The district office will send one of its representatives to the mine to examine the area in question. The representative will issue a citation and will then advise the respondent as to what is required in lieu of the 24-inch required belt clearances. MSHA may take a day or two, or possibly a week to act on the request, and in the meantime the belt is continually used to run coal (Tr. 804).

In the instant case, Mr. Furgerson stated that no violation existed until the respondent installed the additional

support was not for the same location he cited, and respondent's representative accepted this fact and stated "I have no problem with that" (Tr. 819).

Inspector Dati testified that he conducted an inspection on April 16, 1985, and issued Citation No. 2507612, after finding accumulations of float coal dust and coal dust over previously rock dusted surfaces along the No. 4 unit belt conveyor entry along 6 crosscuts for approximately 300 feet. He confirmed that the accumulations ranged in depth from 0 to 6 inches. He saw no belt rollers turning in coal accumulations, and he considered the belt headers to be possible ignition sources.

On cross-examination, Mr. Dati stated that in certain places he observed rock dust under the accumulations, and he believed that the incombustible content of the rock dusted accumulations was in compliance with the applicable standard. He did not make any methane tests, and he saw no problems with the belt headers which were wet. He did not know how long the accumulations had existed prior to his inspection, saw no one working to clean up the accumulations, and had no indication as to when the area was to be cleaned. He believed the violation was significant and substantial because he saw no evidence of any attempts to clean up the accumulations, if the conditions were left unattended he believed that it was reasonably likely that an ignition would occur. He confirmed that he had no knowledge of any prior injuries or accidents at the mine which may have resulted from similar coal accumulations.

Findings and Conclusions

Docket No. KENT 85-105 - Fact of Violation

Citation No. 2507205

I conclude and find that the petitioner has established by a preponderance of the credible evidence that the north conveyor belt was not guarded on the bottom side where a supply road passed under it. Section 75.1722 requires that all exposed moving machine parts and belt conveyor drives,

In this case, the inspector was concerned that someone could contact the belt idler pinch points by reaching in or contacting the unguarded belt where men and equipment regularly passed under it. He was also concerned that someone could be injured in the event the belt broke and "whipped out" and struck someone. The evidence established that supplies were stored near the unguarded belt location where men and equipment regularly passed under it, and the location had been previously guarded by a metal mesh guard which had deteriorated. Respondent's safety manager conceded that someone standing up in a piece of equipment while passing under the unguarded belt could contact the exposed pinch points. Under the circumstances, I find that a violation has been established and the citation IS AFFIRMED.

Citation No. 2507206

The testimony of the inspector establishes the existence of loose coal and coal dust in the three cited entries and crosscuts, and the respondent's safety manager, who was with the inspector when the violation was noted and the citation issued, confirmed the existence of the accumulations in question. I conclude and find that a violation of section 75.400 has been established, and the citation IS AFFIRMED.

Citation No. 2507208

The testimony of the inspector establishes that the packing gland for the cited loader motor was loose and that a service wire for one of the headlights was cut and not insulated. Section 75.503, requires that all electrical face equipment be maintained in permissible condition. The loose packing gland and uninsulated cut wire rendered the loader nonpermissible, and not in compliance with the requirements of the cited standard. Respondent's safety manager did not dispute the cited conditions, and while its maintenance director testified as to matters concerning the gravity of the violation, he did not examine the loader and had no personal knowledge as to the actual condition of the cited loader in question. I find that the petitioner has established a violation of section 75.503, and the citation IS AFFIRMED.

located in the cab of the machine was functioning and operating properly.

Section 75.313 requires that the monitor be kept operative and properly maintained and frequently tested. I can conclude that simply because the cited monitor was gobbled with dirt and oil that it was ipso facto inoperative. The petitioner has the burden of establishing that the cited monitor was inoperative and the inspector conceded that a properly administered test would have established this fact. However, he failed to conduct such a test, and I conclude and find that the inspector's visual observations are insufficient to establish a violation in this case. Further, the respondent is charged with a failure to frequently test the monitor to determine whether it was operative and no evidence was presented to establish that the inspector reviewed any records to determine when the device was last tested or whether or not such tests indicated that the monitor was inoperative. The citation is VACATED.

Docket No. KENT 85-141 - Fact of Violation
Citation No. 2508624

The testimony of the inspector establishes that the high voltage cable was not guarded at the locations in question. The evidence also establishes that supplies were stored under the cable at the cited locations and that in several locations the cable was hung so low as to place it in a position of being damaged by equipment which was required to pass under it. Further, the unrebutted testimony of the inspector establishes that men and equipment regularly passed under the cable while storing and retrieving the supplies and that unguarded cable could readily be contacted by these individuals. The inspector also indicated that the cable was lying on the mine floor at several locations.

Section 75.807 requires that all underground high voltage cables be guarded where men regularly work or pass under

In his defense of Citation No. 2508625, for failure to maintain the explosives magazine in good condition, respondent's representative suggested that Inspector Franks should have cited mandatory section 75.1304, which requires that explosives or detonators which are carried by persons anywhere in the mine be in containers which are maintained in good condition and kept closed. Respondent asserted that since the citation charges that the doors of the cited explosives magazine were not closed due to the warped condition of the doors, and since the magazine was not kept in "good condition" because of the damage to the doors, Mr. Franks should have cited section 75.1304, rather than 75.1306. Respondent also argued that a miner could "carry" the magazine in question by pulling it with a scoop (Tr. 658-661).

The respondent's assertion that Inspector Franks should have cited section 75.1304, is rejected. I conclude that this section is intended to apply in cases where explosives or detonators are hand carried in bags or containers suitable for this purpose by the shooter to the location where he is to fire a shot. The cited section 75.1306, requires that explosive magazines be of substantial construction with no metal exposed on the inside. The evidence in this case clearly establishes that the cited magazine was damaged and that the doors were warped and could not close. Respondent's safety manager Hibbs confirmed that this was the case. Because of this condition, the doors could not close, and the interior metal construction of the magazine was exposed. Under the circumstances, I conclude and find that the magazine was not of substantial construction and that the cited conditions constitute a violation of section 75.1306. Accordingly, the citation IS AFFIRMED.

Citation No. 2508627

The testimony of the inspector establishes the existence of accumulations of loose coal and coal dust along the ribs of the number four unit belt as stated in the citation and the respondent offered no testimony or evidence to rebut this fact. Accordingly, I conclude and find that the petitioner has established a violation of section 75.400 by a preponderance of the credible evidence, and the citation IS AFFIRMED.

3-A belt conveyor entry as described by the inspector. The citation, and the respondent's safety manager confirmed the existence of these accumulations. Accordingly, I conclude and find that the petitioner has established a violation of section 75.400 by a preponderance of the credible evidence, and the citation IS AFFIRMED.

Citation No. 2507618

The testimony of the inspector establishes that the high voltage cable hung across the number three entry haulage road was not protected as required by section 75.807. The respondent's safety manager Hibbs conceded that the cable was not guarded, but believed that no one had any reason to travel under the cable. However, in this case, the evidence establishes that the inspector and Mr. Hibbs passed under the cable while in a golf cart, and the inspector observed equipment traveling the haulage road and he believed that since it was the main haulageway men and equipment would regularly pass under the cable. In addition, the evidence also establishes that the cable guard was apparently knocked off by a piece of equipment and the inspector observed it on the mine floor nearby the location in question. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Docket No. KENT 85-142 - Fact of Violation

Citation No. 2507619

In this case the respondent is charged with a violation of section 75.807, for an alleged failure to guard a high voltage cable hung across a crosscut between the number 2 and 3 entries. The cited standard requires that such a cable be guarded where men regularly pass under it.

Respondent's argument is that there is no evidence as to when the cable was hung at the location where the inspector found it, and that Inspector Dati had no knowledge as to where mining was taking place or where the power center was located. Respondent's representative asserted that the testimony of Mr. Hibbs supports a strong reference that the equipment tire tracks observed by Inspector Dati were made prior

mony of Inspector Dati that he saw tire tracks under the cable. Mr. Dati conceded that there were other means of access and travelways to the area where mining was being conducted on the unit, and he candidly admitted that he had no way of determining whether or not the tire tracks were made prior to or after the installation of the cable in question (Tr. 354).

Mr. Dati referred to his notes made at the time of the inspection, but they contained no information as to the location of the power center, and he candidly conceded that he could not remember in which entry the power unit was located, nor could he remember where the brattice line was installed or where the unit was operating (Tr. 356). He also could not remember how long it took to develop the crosscuts, and he conceded that if the unit were operating "straight ahead," the equipment would not have to pass under the cable (Tr. 356). Mr. Dati did not know how much time had passed prior to the advancing of the cable to the location where he observed it, and he confirmed that it was probably more than one shift. He also confirmed that equipment could have passed through other crosscuts, that the cited location was just one of many ways for the unit to advance (Tr. 359), and that he spoke with none of the equipment operators to determine whether they may have passed under the cable (Tr. 365).

Mr. Dati confirmed that he observed no cable damage, abrasions, or scuff marks indicating that the cable had ever been struck by equipment passing under it, and he confirmed that the cable was equipped with an operative ground check monitoring device (Tr. 371, 386).

Section 75.807, requires that high voltage cables be covered, buried, or placed so as to afford protection against damage, and guarded where men regularly work or pass under them. In support of the citation, MSHA's counsel argued that Mr. Dati's observations of the tire tracks passing under the cable is sufficient to establish that men regularly passed or worked under the cable. Counsel also asserted that the evidence establishes that the cable was not guarded against damage, and that the essence of the citation issued by Inspector Dati was the prevention of both physical damage to the cable and injury to miners who may have come in contact with it.

area to which miners were going had been marked. Judge Merlin rejected the inspector's assertion that he cited the travelway areas where the cable was hung because he believed men regularly worked on passed under the cable while traveling the crosscuts to get supplies from the storage area. Judge Merlin accepted the testimony of the operator's safety inspector that the crosscuts were no longer supply areas because mining had advanced 200 feet beyond the cited areas, and he concluded that the evidence did not establish that men regularly worked or passed under the cable in question.

In the instant case, it seems clear to me that Inspector Dati issued the citation because he believed that miners were travelling under the unguarded cable. However, I conclude and find that there is no credible testimony or evidence to establish that men regularly worked or passed under the cable. Apart from his observations of the tire tracks, after viewing Inspector Dati on the stand, and upon careful examination of his testimony, I am convinced that he had no idea where mining was taking place, where the power center was located, or in which direction the unit was being driven. In short, I cannot conclude that there is any credible evidence to support an inference that men or equipment passed under the cable after it was advanced and installed at the location where it was found by the inspector.

The evidence establishes that there were other means of travel to the area where men and equipment would go to reach the area where mining was being conducted, and the testimony of Mr. Hibbs, although somewhat confusing, convinces me that the direction of mining and the location of the power center were such as to support a conclusion that the tire tracks observed by Mr. Dati were made before the cable in question was advanced and installed. Under the circumstances, I conclude and find that MSHA has failed to establish by any credible evidence that men regularly worked or passed under the cable in question, and that it was required to be guarded.

MSHA's contention that the cable was not otherwise protected against damage is rejected. The standard requires guarding only in instances where men regularly work or pass under it. If they do not, the cable must be covered, buried

materially 1/2 inch 3 feet off the floor, and was properly insulated. Under the circumstances, I conclude and find that the cable was placed so as to afford it protection against damage, and that it was in compliance with the requirements of section 75.807. In view of the foregoing findings and conclusions, the citation IS VACATED.

Docket No. KENT 85-167 - Fact of Violation

Citation No. 2507619

The testimony of the inspector establishes that the methane monitor for the cited loader in question was bridged out and had a disconnected wire which rendered it inoperative, and the respondent's mine foreman Whitley and safety manager Furgerson confirmed this fact. Further, the inspector confirmed that when he activated the methane monitor test button on the machine, it would not deenergize the machine.

Mandatory safety standard 75.313 requires that methane monitors which are installed on loading machines are to be kept in an operative condition and properly maintained. They are also required to be tested as prescribed by MSHA. On the facts of this case, it is clear to me that the cited methane monitor was not maintained on an operative condition as required by section 75.313. I conclude and find that the petitioner has established a violation by a preponderance of the credible testimony, and the citation IS AFFIRMED.

MSHA's request to reopen the record in Docket No. KENT 85-167, for additional testimony by the inspector was denied (Tr. 820).

Docket No. KENT 85-180

Citation No. 2507175

The respondent is charged with a violation of section 75.1303 for failure to insure that loader operator Marvin Ferguson was not in the clear when the shot was fired by shooter Bealmear. Section 75.1303 requires that all explosives and blasting devices be used in a permissible manner. In issuing the citation, Inspector Oglesby made reference to the explosives permissibility requirements of 30 C.F.R.

The evidence establishes that at the time the shot was fired, Mr. Ferguson was still in the adjacent working but was not in the direct path of the shot which blew him out of the entry. The evidence also establishes that Mr. Ferguson received ample verbal warnings from Mr. Bealmear, was aware that a shot was to be fired, and was doing no work at the time the shot was detonated. However, it is clear that Mr. Bealmear did not remove Mr. Ferguson from his working place before firing the shot.

Mr. Bealmear apparently believed that Mr. Ferguson was safe, and he obviously relied on Mr. Ferguson's judgment rather than his own since Mr. Ferguson indicated that he was out of danger. Mr. Bealmear stated that after warning Mr. Ferguson he proceeded to the number 5 entry and "got the cutter man out." He then proceeded to the number 3 entry and again warned Mr. Ferguson before firing the shot (Tr. 150-151). He later stated that he simply warned the cutter man and that he came out of the entry voluntarily and that he saw Mr. Ferguson out of the entry. Mr. Bealmear stated that he did not know whether he would have refused to shoot if the cutter man did not come out of the entry, and he confirmed that he did not believe the shot would come through (Tr. 150-151).

I fail to understand why Mr. Bealmear did not order Mr. Ferguson out of the entry or wait to see that he was completely out before firing the shot. Mr. Ferguson indicated that when he was initially warned he proceeded on his way out of the entry, but stopped short at the rib after the second warning and stooped against the rib. Under the circumstances, I conclude and find that Mr. Bealmear failed to exercise due care in ascertaining that Mr. Ferguson was completely out of the entry where he had been working before he fired the shot. I find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2507176

Inspector Oglesby issued the citation charging a violation of section 75.1300, because he believed that the shot fired by Mr. Bealmear was an "unconfined" shot. Section 75.1300 prohibits the firing of such shots underground. Mr. Oglesby defined an "unconfined shot" as one which

unconfined by the appearance of the shot hole after it had been fired and the fact that the shot blew out (Tr. 79). He testified that he did not know the type of explosive used by Mr. Bealmear and could not determine whether the shot had been stemmed. However, he confirmed that no citations were issued for lack of proper stemming or nonpermissible explosives.

Inspector Oglesby further explained that an unconfined shot is one which has no material around the shot placed in the borehole to confine it. He indicated that stemming is placed around the loaded powder charge to keep it from blowing back out of the hole, and if the charge is not stemmed the borehole "would be just like a muzzle of a gun and the flame would shoot out the hole" (Tr. 60).

MSHA's counsel took the position that if a blowout occurs, one can conclude that the shot was not confined, and if a blowout does not occur, one may conclude that the shot was confined (Tr. 61). In this regard I take note of the definition of a "blown-out shot" found in the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, at pg. 1004. Such a shot is defined as "a shot which merely throws out the stemming without loosening much of the coal." In this case, the evidence establishes that the shot itself blew out and apparently ignited coal dust or methane which caused the explosion resulting injuries to Mr. Ferguson, and that none of the coal surrounding the shot hole was disturbed or blown out.

Inspector Oblesby's conclusion that there was insufficient overburden less than 18 inches around the shot hole was based on his assumption that sufficient overburden would have prevented the blow-out (Tr. 68). He also considered the fact that the top coal appeared to be cracked and loose and that the surrounding coal immediately behind the shot on the number 3 entry side was broken and fractured (Tr. 68, 74). Mr. Oglesby further explained his perception of an unconfined shot as follows (Tr. 82-84):

Q. What is the difference between a blowout and an unconfined shot?

A. An unconfined shot, to me, is the one that doesn't have any burden around it, 18 inches.

lines and adobe shots, what is the primary purpose of their meaning of that law?

A. What is the reason for the law?

Q. No. What is their meaning behind what an unconfined shot is or an adobe shot is?

A. It's to keep people from shooting unconfined shots with concussion of the shot itself.

Q. Is there any difference between shooting a lump of coal that has a drill hole in it and laying a piece of powder on top of a rockfall and shooting that?

A. Sure.

Q. What's the difference?

A. You have an unconfined shot where you are putting the powder on top of the rock. If you drilled the piece of coal, put your powder in it, put a stemming device in it, that's confined.

When asked about his interview with Mr. Bealmear during the course of his investigation, Mr. Oglesby responded as follows (Tr. 94):

JUDGE KOUTRAS: Did he explain to you how he loaded the shot?

A. No.

JUDGE KOUTRAS: He didn't?

A. No, just saying there was one stick of powder in it.

JUDGE KOUTRAS: You didn't ask him about how he loaded it?

A. I don't remember. I don't remember that part of it.

JUDGE KOUTRAS: Was it confined?

A. I don't remember that, no, sir.

Mr. Bealmear testified that he loaded the shot hole in question with one stick of powder, tamped the hole, and pulled back on the wire to insure that the powder did not drop through the hole. He confirmed that he stemmed the hole by inserting "water dummies" behind the powder (Tr. 132-133). He confirmed that he had spoken with certain state inspectors when the Kentucky State Department of Mines investigated the incident. When asked about a statement attributed to him in the state report that he "felt the powder push through but that he pulled in back in place" (exhibit P-10, pg. 5), Mr. Bealmear explained that the powder did not fall through the hole and that he simply pulled back on the wire to make sure the powder was still sliding in the hole (Tr. 172-173, 176).

Mr. Bealmear stated that the drill hole which he loaded had been previously drilled and shot from the other side but did not go all the way through. He did not know the depth of the hole and he conceded that after pulling the wire to insure that the powder was sliding in the hole, he did not push the powder all the way back to the end of the loose hole (Tr. 176-178). He also conceded that he knew the coal would shoot through but did not know that it would ignite (Tr. 178).

Referring to a sketch of the scene of the detonation, (exhibit R-1), Mr. Bealmear conceded that his prior shot from the number 3 entry could possibly have weakened or fractured the coal in that area. He confirmed that the back of the hole which he loaded from the number 4 entry side would be the area which he had previously shot (Tr. 166). Given these circumstances, he expected that the coal would blow through but never expected an ignition to occur because he did not believe that coal blowing through the hole could ignite methane or coal dust (Tr. 167).

tured and loosened by a prior shot, and had failed to the shot in question. The evidence also leads me to that by failing to push the powder charge all the way end of the previously drilled and shot hole, and then ming it completely, Mr. Bealmear had no way of knowing distance between the charge and the end of the weakened loosened hole, and that this contributed to the appearance of total confinement of the charge which was detonated. citation IS AFFIRMED.

Docket No. KENT 85-159 - Fact of Violation

Citation No. 2507418

The respondent in this case is charged with a violation of the safeguard provisions of section 75.1403-5(g), failure to provide a clear travelway along a conveyor belt a distance of 50 feet. In issuing the citation, Inspector Newlin relied upon a previously issued safeguard notice (2507409) on February 26, 1985, in conjunction with Mine supervisory inspector George Siria (exhibit P-22). The previous notice was issued because "A clear travelway was not maintained on the 3-C belt for 150 feet starting 450 feet inby the 3-C header," in violation of section 75.1403-5(g) which provides as follows:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

After Mr. Newlin issued his section 104(a) citation on March 18, 1985, on the number 3-A belt, Mr. Siria modified on March 20, 1985, and imposed the same "stipulations" on that belt as he had done for the number 3-C belt. In fact, he terminated the citation on April 12, 1985, after determining that "The operator installed start and stop switches inby and outby of the area and also posted signs."

clearances.

Mr. Newlin's citation was terminated by MSHA Inspector Dennis Dati on April 12, 1985, and his termination notice reflects that it was terminated after "The operator installed start and stop switches both inby and outby of the area and also posted signs."

MSHA's position is that a safeguard notice applies to any underground location in the mine. However, any modification made to the safeguard notice would only apply to the particular location for which it was issued and not to other mine areas (Tr. 767-768). In the instant case, MSHA's counsel asserted that although the previously modified safeguard notice of February 26, 1985, eliminated the requirement for a clear travelway at the location for which that safeguard was issued, it did not authorize the respondent to unilaterally not provide clear travelways at other belt locations which were required to be examined, traveled or maintained (Tr. 747-750).

MSHA's counsel asserted that the citation issued by Inspector Newlin in this case was issued because of the failure by the respondent to provide clear travelways of at least 24 inches along the cited beltline as required by section 75.1403-5(g). Once the citation issued, supervisory inspector Siria modified the citation for that particular location by imposing stipulations requiring stop and start switches, signs, and a requirement that the belt be stopped before being examined. Once these stipulations were in place, the safeguard, as modified by Mr. Siria, became a requirement for that location, but the respondent was still required to maintain clear travelways at other locations in compliance with section 75.1403-5(g) (Tr. 747-753).

Inspector Newlin explained that by requiring the respondent to adhere to the stipulations for providing a means of access to the beltline at locations which have been cribbed out because of adverse roof conditions, MSHA is in effect providing the belt examiner with a "walkway," i.e., the belt

ing itself to a citation for not having clear travelways as required by section 75.1403-5(g) (Tr. 757). Counsel assert that the safeguard provisions present unique situations in that once MSHA is made aware of a problem, it may impose a safeguard to address that problem. In the instant case, counsel pointed out that rather than requiring the responder to tear out the beltline and move it to another entry where the roof conditions were better and did not require cribbing it imposed certain safeguard stipulations for that particular location. However, the requirements for clear travelways at other locations still remained in effect (Tr. 757-760).

MSHA's counsel asserted that each incident of roof cribbing which results in the effective elimination of the travelway must be individually addressed, and the mine operator must not simply go ahead and install stop and start switches and claim that it is in compliance. MSHA must first examine the conditions before authorizing the implementation of alternative means of compliance, and the operator may not unilaterally take these additional steps (Tr. 760-761). Even if the respondent in this case had installed the stop and start switches at the place which was cited, it would still be in violation of the clear travelway requirement of section 75.1403-5(g), because it would not have had MSHA's approval to modify the clear travelway safeguard requirements for that location (Tr. 762-764; 766-767).

MSHA's counsel further explained the safeguard procedure as follows (Tr. 790-791):

MR. GROOMS: The only analogy I can think of is a form of abatement, your Honor. It's a form of abatement that's peculiar to the issuance of Safeguards. Issuance of Safeguards is a peculiar thing in itself. It's the Secretary making a judgment about what the law is going to be in a particular mine.

* * * * *

MR. GROOMS: It seems to me the analogy to abatement may be right in the sense that in a

been established that you don't provide a clear way for that one spot in the mine.

Respondent's representative confirmed the procedures for complying MSHA with respect to obtaining a waiver of the requirements for maintaining belt walkway clearances as required by section 75.1403-5(g), and he explained that as a practical matter if the roof conditions are bad the respondent installs the cribs immediately in order to support the roof and MSHA is later notified. He agreed that even if the inspector in this case advised the respondent to install cribs for roof support, such a request was not unreasonable (r. 818).

The evidence adduced in this case establishes that the cited belt conveyor travelway in question was not provided with the clearances required by the cited safeguard standard. The evidence also establishes that the respondent had adequate notice as to the requirements of the previously issued safeguard and that it was aware of the procedures followed by MSHA in issuing such safeguards at the mine. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Citation No. 2507612

The testimony of the inspector establishes the existence of float coal dust and coal dust along the belt conveyor on the number 4 unit. The accumulations were extensive and the inspector saw no evidence of any clean-up efforts by the respondent. The respondent offered no testimony in defense of the violation. I conclude and find that the evidence adduced by the petitioner supports a violation of section 5.400, and the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-2 is an MSHA computer print-out summarizing the respondent's compliance record for the period April 26, 1983 through April 25, 1985. That record reflects that the respondent paid civil penalty assessments totaling \$92,243 for 893 violations. Three-hundred and thirty-one of the citations are paid \$20 "single penalty-non S&S" citations.

violations of the blasting requirements of 75.1300 are noted.

Exhibit P-1 is a computer print-out covering the respondent's history of prior violations for the period January 1, 1983 through January 28, 1985. Some of the information is included in exhibit P-2. I have considered all of the information pertaining to the respondent's history of prior violations, and this is reflected in the penalty assessments by me for the violations which have been affirmed.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties have stipulated as to the scope of the respondent's mining operations and agreed that the payment of civil penalties will not adversely affect the respondent's ability to continue in business. I conclude that the respondent is a large mine operator and that the payment of assessed penalties in these proceedings will not affect the respondent's ability to continue in business.

Good Faith Abatement

The parties stipulated that all of the conditions and practices cited as violations in these proceedings were abated in good faith by the respondent. I agree, and conclude that the respondent exercised good faith in abating the cited violations.

Negligence

I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited mandatory standards. I further conclude and find that the respondent or should have known about the cited conditions and the failure to insure against such conditions constitutes primary negligence. With regard to Citation No. 2507176 (Docket No. KENT 85-180), concerning the unconfined storage of explosives, the inspector indicated that in view of the fact that the

been affirmed in these proceedings were serious. The unguarded belt was in an area where miners congregated and where a roadway passed under the belt and it presented a hazard in that someone could have inadvertently come in contact with the unguarded belt pinch points.

The loose coal and float coal dust accumulations violations presented a fire and explosion hazard. None of the cited accumulations had been cleaned up and the inspectors observed no indication as to any cleanup efforts by the respondent. Although one citation (2507206) concerned accumulations in a neutral return where active mining was not taking place, the remaining three citations (2508627, 2507611, 2507612) concerned rather extensive accumulations of loose coal and coal dust, some of which was in contact and turning in belt rollers, and ignition sources such as a cable and belt headers were present. Although the evidence indicated that one location was wet and that other locations were properly rockdusted, the fact remains that all of the cited accumulations presented a fire hazard. In the event of a fire or ignition, the accumulations presented a real potential for fueling a fire or contributing to its severity.

The unguarded high voltage cable violations were at locations where men or equipment passed under them, and presented a hazard in that miners could contact the cables and equipment could have damaged the cable. In one instance, the evidence indicated that one of the cable guards had apparently been knocked off by a piece of equipment. In another, the cable was lying on the floor at several locations. Although the respondent established that its high voltage cables are protected by short circuit monitoring devices and are of a high quality, the fact remains that the failure to guard the cable exposed it to potential damage or contact by miners. The purpose of the guard is to prevent these occurrences, and in the event of cable failure or an inoperative monitoring device, miners would be exposed to a hazard.

The permissibility violation concerning the L23 loader presented a potential shock hazard to anyone contacting the uninsulated and cut headlight wire, and the loose packing gland presented a hazard in that it did not serve the purpose

rendered the monitor inoperative, and when tested, it would not deenergize the machine. In the event methane were entered while the machine was in operation, the failure to deenergize it would present a possible explosion or ignition hazard.

The explosive magazine violation presented a hazard that the failure of the doors to close tight rendered the magazine less than a secure storage area and exposed the explosives to possible damage.

The unconfined shot violations resulted in an explosion when the shot apparently ignited coal dust or methane and injured two miners. Both miners suffered burns, and one of them was hospitalized with serious burn injuries. The failure to remove that miner from his working place resulted in injury to that miner, as well as the shooter.

The safeguard violation concerning an inadequate clearance along a beltway presented a hazard in that the belt walker was precluded from making his normal inspection of the belt. The obstruction caused by the installation of roof cribs prevented the examination of the belt for a distance of 50 feet, and any hazardous conditions which may have been present would go undetected.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) the Commission explained its interpretation of the term "significant and substantial" as follows:

a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

Incorporating by reference my gravity findings, and applying the principles of a "significant and substantial" violation as articulated by the Commission in the aforementioned decisions, I conclude and find that with two exceptions, (Citation No. 2507206-coal accumulations and Citation No. 2508625-improperly maintained explosive magazine), the remaining violations were all significant and substantial, and the findings by the inspectors in this regard ARE AFFIRMED.

I conclude and find that in terms of continued normal mining operations, the evidence presented supports a conclusion that there was a reasonable likelihood that the cited conditions could contribute to the hazards resulting from the violative conditions in question. These hazards are noted in my gravity findings, i.e., contact with unguarded pinch points, possible fire or explosion resulting from accumulations of loose coal and coal dust, high voltage cable contact

tion of the belt for possible hazardous conditions. In the event of these instances, had the events noted occurred, I believe it is reasonable to conclude that the injuries produced could be of a reasonably serious nature.

With regard to Citation No. 2507206, the cited coal accumulations were found in a neutral belt entry where no active mining was taking place. The active faces had advanced beyond the area where the accumulations were located, and the inspector saw no evidence of any equipment passing through the area, and he confirmed that no immediate ignition sources were present. The inspector found negligible amounts of methan gas and issued no citations for lack of adequate rock dusting. The inspector also confirmed that the closest mining taking place was through crosscuts (100 feet) away, and that the face area was approximately 180 feet from the area where the accumulations were present. Given these circumstances, I cannot conclude that MSHA has presented any credible evidence to support a conclusion that there was a reasonable likelihood that an accident or injury would occur. While I have concluded that the accumulation violation was serious, I cannot conclude that it was significant and substantial, and the inspector's finding is VACATED.

With regard to Citation No. 2508625, the inspector believed that the improperly maintained explosives magazine violation was significant and substantial in that it was reasonably likely that it would be struck by a piece of equipment if it were to be moved about the unit. On the facts of this case, I find this hardly unlikely. The magazine was positioned on a track, and the photograph exhibits of a comparable magazine reflect that it is of steel construction and mounted on wheels and protected by a steel superstructure which surrounds the vehicle. The respondent's un rebutted testimony is that when the magazine is moved, the wheels are in a down position, and that in this position, it is impossible to move the magazine with the doors opened because they would strike the wheels.

The inspector agreed that in its parked position, the magazine posed no hazard. Although he alluded to a possibility of a piece of coal finding its way into the opened doors and detonating the explosives which were stored inside, the

concluded that the violation was serious, I cannot conclude that the petitioner has established that it was significant and substantial. The inspector's finding in this regard IS VACATED.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, the following civil penalties are assessed by me for the violations which have been affirmed.

Docket No. KENT 85-105

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2507205	1/29/85	75.1722	\$ 125
2507206	1/30/85	75.400	\$ 150
2507208	1/31/85	75.503	\$ 135

Docket No. KENT 85-141

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2508624	4/11/85	75.807	\$ 125
2508625	4/11/85	75.1306	\$ 150
2508627	4/11/85	75.400	\$ 200
2507611	4/12/85	75.400	\$ 200
2507618	4/13/85	75.807	\$ 150

Docket No. KENT 85-167

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2507503	3/21/85	75.313	\$ 750

Docket No. KENT 85-180

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2507175	3/11/85	75.1303	\$1,000
2507176	3/11/85	75.1300	\$ 600

ORDER

The respondent IS ORDERED to pay the civil penalties the amounts shown above within thirty (30) days of these decisions. Payment is to be made to MSHA, receipt of same, these proceedings are dismissed.

Citation No. 2507209 (Docket No. KENT 85-105),
Citation No. 2507619 (Docket No. KENT 85-142), ARE VACATED


George A. Koutras
Administrative Law Judge

Distribution:

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May 7, 1986

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 85-40
Petitioner	:	A.C. No. 40-02268-03527
	:	
v.	:	Docket No. SE 85-46
	:	A.C. No. 40-02268-03528
J & C COAL CORPORATION, a/k/a	:	
J C Corporation,	:	
Respondent	:	Pee Wee No. 1
	:	Campbell County, TN

DECISION

Appearances: Charles F. Merz, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petitioner;
Mr. Stuart P. Bradley, Treasurer, J C Corporation,
Jacksboro, TN, for Respondent

Before: Judge Fauver

The Secretary of Labor brought these actions for civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At the time the citations and orders were issued, Respondent was known as J C Corporation. Effective January 31, 1985, the legal name was changed to J & C Coal Corporation, reflecting the corporate name as registered with the Tennessee Secretary of State. In accordance with the parties' stipulation, the Respondent's name in the caption of this case is AMENDED to be "J & C Coal Corporation, a/k/a J C Corporation."

2. At all pertinent times, Respondent has operated an underground coal mine in Campbell County, Tennessee, known as Pee Wee No. 1 Mine, producing coal for sale or use in or substantially affecting interstate commerce.

4. On September 19, 1984, Inspector Payne conducted an inspection of the Pee Wee No. 1 Mine pursuant to § 103(a) of the Act. In the course of his inspection he observed violations of the approved roof control plan and violations involving exposed high voltage components of the electrical system, for which he issued Citation No. 2470944 and Order No. 2470946. He accurately determined, under § 104(d)(1) of the Act, that the violations could significantly and substantially contribute to the cause of an injury and that they were due to an unwarrantable failure of the operator to comply with mandatory health and safety standards.

5. On September 24, 1984, Inspector Payne again inspected the mine and observed that the power center supplying electrical power to the No. 3 belt drive had been located in a return air conduit and because of an S & S violation, he issued Order No. 2470951 under § 104(d)(1) of the Act.

6. On November 14, 1984, Inspector Payne conducted another inspection of the mine pursuant to § 103(a) of the Act and observed conditions constituting violations of mandatory safety standards for which he issued Citation Nos. 2472496, 2472497, 2472498, 2472499 and 2472500 under § 104(d)(1) of the Act.

7. On November 18, 1984, Inspector Payne again inspected the mine in accordance with § 103(a) of the Act and observed that the ventilation control plan was not being followed and issued Citation No. 2475981 under § 104(d)(1) of the Act.

8. On November 19, 1984, Inspector Payne inspected the mine pursuant to § 103(a) of the Act and observed that fire sensors were not located close enough to the No. 3 belt conveyor to be effective. Citation Nos. 2475962 and 2475963 were issued in accordance with the provisions of § 104(d)(1) of the Act.

of fact.

10. The Secretary stipulates that the conditions giving rise to the citations and orders were promptly and in good faith abated.

11. At the time the citations and orders were issued, Respondent was controlled exclusively by Charles Bowlin, President of the Corporation. On February 1, 1985, all stock in the Respondent corporation was purchased from Mr. Bowlin by D.M.C. Energy, Inc., wholly terminating all interest of Mr. Bowlin in the Respondent corporation. Thereafter, management and direction of mining operations were performed by Charles M. Asbury and Stuart Bradley. By the terms of the purchase agreement D.M.C. Energy, Inc., assumed all financial liabilities of the corporation.

12. At the time D.M.C. Energy, Inc., obtained the stock of J & C Coal Corporation, it was then operating an underground mine at Lickfork, Tennessee, which mine is currently registered with MSHA reflecting D.M.C. Energy, Inc., as the operator, mine identification No. 40-01799.

13. Upon obtaining control of the J & C Coal Corporation D.M.C. Energy, Inc., ordered the subject mine temporarily closed requested MSHA to conduct a complete inspection of the mine for the purpose of identifying all conditions which would give rise to a citation if observed in the normal course of a mine inspection. Such an inspection was conducted and D.M.C. Energy, Inc., expended substantial funds to correct all potentially violative conditions and to replace existing mining equipment.

14. The mine reopened about March 1, 1985. In the 12 months following reopening of the mine MSHA inspectors issued 23 citations to the operator on 16 inspection days.

the new owner and management with the violations found in 1984.

I find that the safety expenditures and changes by the new management are commendable, especially when compared to the safety record of Respondent under the prior management in 1984. However, the new measures were needed because Respondent under the prior management had failed to comply with numerous mandatory safety standards of the Act and regulations promulgated under the Act. The safety record after the 1984 violations is not a basis for eliminating or reducing civil penalties for such violations. However, considering the financial needs of Respondent, six months will be allowed to pay the civil penalties assessed herein.

In permitting this schedule for payment, I note that Respondent acknowledges its financial ability to pay Mrs. Bowlin under the stock-sale agreement, and that civil penalties due MSHA for the 1984 violations are a pro rata offset of Respondent's indebtedness under such sale agreement.

Respondent is a medium-sized coal business. At the time of the violation it was a small operator. Its number of miners and coal production have substantially increased since the present management took over operations.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Respondent violated the sections of the Act or 30 C.F.R. as charged in the following citations and orders, for which Respondent is ASSESSED the civil penalties shown:

2472498	20
2472499	74
2472500	20
2475961	168
2475962	20
Total	<u>\$3,042</u>

ORDER

WHEREFORE IT IS ORDERED that Respondent shall pay the above civil penalties in the total amount of \$3,042 in six equal monthly payments of \$507, beginning on June 1, 1986, and becoming due on the first day of each successive month thereafter until the total of \$3,042 is paid.

William Fauver
 William Fauver
 Administrative Law Judge

Distribution:

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Mr. Stuart P. Bradley, Treasurer, J C Coal Corporation, P.O. Box 174, Jacksboro, TN 37757 (Certified Mail)

Mr. Charles M. Asbury, President, J C Coal Corporation, P.O. Box 174, Jacksboro, TN 37757 (Certified Mail)

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DECISION

Appearances: James H. Barkley, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Complainants;
Thomas C. Means, Esq., Crowell & Moring, Washington
D.C.,
for Respondent.

Before: Judge Morris

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., and it involves the interpretation of sections 115 and 105(c) of the Act.

After a hearing before the undersigned the Secretary was granted leave to amend his complaint to add additional complainants. The undersigned severed the amended complaint and designated all subsequent matters relating to the amended petition as "Secretary of Labor, Mine Safety and Health Administration on Behalf of Mark A. et al, Complainants, v. Emery Mining Corporation, Respondent, Docket No. WEST 80-489-D(B)." In the interim Docket No. WEST 80-489-D(B) was appealed to the Commission.

After considering the issues, the Commission ruled that Emery violated section 105(c) of the Act when, after hiring the complainants as new miners, it nevertheless refused to compensate them for 32 hours of training. The miners had to obtain such training because of respondent's hiring practices, 5 FMSHRC 1391 (1983).

Subsequently, respondent appealed the Commission decision to the United States Court of Appeals for the Tenth Circuit where it was docketed as case number 83-2017. In addition, the parties stipulated that the instant case would be determined by the ruling of the appellate court. In view of the stipulation of the parties the undersigned stayed further proceedings in the captioned case pending a ruling from the appellate court.

being employed by respondent. Specifically, the Court ruled that none of the complainants were "miners" under the Act or employed by respondent at the time they took their training. Further, it was the view of the Court that the statute was clear on its face. In sum, the Court declined to enforce the Commission order.

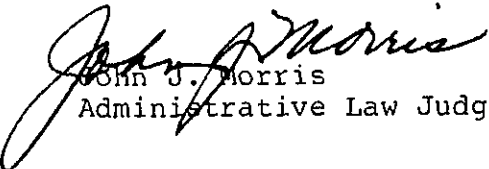
Respondent thereafter filed a motion for summary judgment on the captioned case. The motion is within the stipulation of the parties.

Thereafter the undersigned dissolved the stay of the instant proceedings. The Secretary, in his response to the motion for summary judgment, concurs that Emery's motion should be granted.

On the basis of the decision of the United States Court of Appeals for the Tenth Circuit in Docket No. 83-2017, the pleadings and the stipulation of the parties, I enter the following:

ORDER

1. Respondent's motion for summary judgment is granted.
2. The discrimination complaint is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

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May 8, 1986

ODELL MAGGARD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 86-1-D
	:	MSHA Case No. BARB CD 85
CHANEY CREEK COAL CORPORATION,	:	
Respondent	:	No. 3 Mine
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-51-D
ON BEHALF OF	:	MSHA Case No. BARB CD 85
ODELL MAGGARD,	:	
Complainant	:	No. 3 Mine
v.	:	
	:	
DOLLAR BRANCH COAL	:	
CORPORATION,	:	
and	:	
CHANEY CREEK COAL CORPORATION,	:	
Respondents	:	

DECISION

Appearances: Tony Oppeward, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Odell Maggard;
Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Thomas W. Miller, Esq., and Julie Goodman, Esq., Miller, Griffin & Marks, P.S.C., Lexington, Kentucky, for Respondents

Before: Judge Melick

Background

On June 11, 1985, Odell Maggard filed a complaint with the Department of Labor, Federal Mine Safety and Health Administration (MSHA) alleging that on January 10, 1985, he had been discharged in violation of section 105(c)(1) of the

had not yet been determined whether or not a violation of section 105(c) had occurred.^{3/} That letter reads in part as follows: "[b]y the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days."

1/ Section 105(c)(1) provides in part as follows:

"No person shall discharge . . . or cause to be discharged . . . or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any . . . mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in any mine . . . or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

2/ Section 105(c)(2) reads in part as follows:

"Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint. . . ."

3/ Section 105(c)(3) of the Act provides in part as follows:

"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)."

Maggard against Dollar Branch Coal Corporation under section 105(c)(2) of the Act.^{5/}

In his complaint the Secretary states that Maggard's complaint filed October 1, 1985, under section 105(c)(3), has been filed before the Secretary "had an opportunity to determine whether or not a violation of the Federal Mine Safety and Health Act of 1977 had occurred" and maintains for that reason that Maggard's complaint should now be dismissed.

Motion to Dismiss

In his motion to dismiss the Secretary argues that he need not comply with the requirements of the Act that he make a determination as to whether or not discrimination has occurred within 90 days of his receipt of a complaint. He further argues that should the aggrieved individual file his own complaint under section 105(c)(3) after the statutory 90-day period, that case will become null and void as lacking a jurisdictional basis if the Secretary later decides to file a complaint of his own under section 105(c)(2).

While the Secretary has no standing to interpose a motion to dismiss in Maggard's section 105(c)(3) case, the Secretary's motion nevertheless raises a threshold jurisdictional question. Indeed the Act itself does not provide express guidance as to the procedures to be followed by an individual complainant under section 105(c) in the event the Secretary does not make his decision (as to whether a violation of the Act has occurred) within the 90-day time frame set forth under section 105(c)(3).

4/ Commission Rule 40(b) reads as follows:

"A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary."

5/ The Secretary amended his complaint without objection at the commencement of hearings on January 15, 1986, to propose a civil penalty and to include Chaney Creek Coal Corporation as a party Respondent.

his own complaint under these circumstances. This administrative interpretation is entitled to great weight. Chevron, U.S.A., Inc. v. National Resources Defense Council, 104 S.Ct. 2778 (1984); Manufacturers Ass'n v. National Resources Defense Council, 105 S. Ct. 1102 (1985); Federal Election Commission v. Democratic Senatorial Campaign Committee, 102 S.Ct. 38 (1981) and Zenith Radio Corp v. United States, 98 S.Ct. 2441 (1978). Such a construction is, moreover, consistent with the liberal construction to be accorded safety legislation. Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980). More specifically this construction is essential to accomplish the objective of the statute and to avoid unjust and oppressive consequences to aggrieved miners where the Secretary fails to act within the prescribed time. Caminetti v. United States, 37 S. Ct. 192 (1917). Administrative notice may be taken of a recent case in which the Secretary delayed almost 4 years before deciding not to represent a miner on his 105(c) complaint. (Dan Thompson v. Cypress Thompson Creek, MSHA Case No. 82-27). The miner is seriously prejudiced by such delay as witnesses move, memories fade and documents are lost or destroyed, and may suffer unwarranted economic hardship. Such a result is clearly contrary to the objectives of the Act.

Under the circumstances it is clear that this judge has jurisdiction to entertain Mr. Maggard's case (under section 105(c)(3) and Commission Rule 40(b)) as well as the Secretary's case brought on behalf of Mr. Maggard under section 105(c)(2) of the Act. The Secretary's Motion to Dismiss is denied.

The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, it must be proven by a preponderance of the evidence that Mr. Maggard engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.